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In the Supreme Court of the United States

No. 71-876

JOSEPH A. NEMETZ,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

Joseph A. Nemetz,

Petitioner

vs.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph A. Nemetz prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in his case.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 309 Fed. Supp. 1336 and is printed in the Appendix at p. 75. The Opinion of the Court of Appeals is reported at F. 2d and printed in the Appendix at p. 85.

JURISDICTION

The Opinion and Order of the Third Circuit Court of Appeals was filed November 4, 1971. An order denying the petition for rehearing and suggestion for rehearing by the Court en banc was entered December 3, 1971 (See p. 97). The jurisdiction of this Honorable Court is invoked under 28 USC 1254(1). The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by the United States of America under provision of 26 USC 7201.

QUESTIONS PRESENTED FOR REVIEW

1. Is a new trial mandated when a Special Agent of the Internal Revenue Service deliberately violates a procedural directive of his agency by not clearly disclosing his criminal function at the initial contact with the to be investigated taxpayer within the meaning of *U.S. v. Heffner*, 1969, 4 Cir., 420 F. 2d 809, and cases cited therein and *U. S. v. Leahey*, 1 Cir., 1970, 434 F. 2d 7?

2. When special agents of the Internal Revenue Service confront a taxpayer for the purpose of obtaining oral admissions plus his written records for use in the investigation they are then conducting into his affairs, is this a "critical stage" which mandates a right to counsel warning within the meaning of *Coleman v. Alabama*, 1970, 90 S. Ct. 1999, 2002, 399 U.S. 1, 7; *U. S. v. Wade*, 1967, 87 S. Ct. 1926, 1930-1931, 388 U.S. 218, 222-223, and, if so, has defendant waived this right under the fact circumstances of this case when examined in light of *Johnson v. U. S.*, 330 U.S. 10, 12; *Amos v. U. S.*, 1920, 225 U.S. 313, 315, 317 and *Von Moltke v. Gillies*, 1948, 332 U.S. 708, 724?

3. Does a confidential relationship exist between a bank and its depositor and, if it does, must 26 USC 7602 process be served before the bank records are made available for I.R.S. special agent examination and, if so, does the taxpayer have an absolute right, to notice that the summons has been served plus the opportunity to intervene and participate when the Special Agent interviews the witness so that he can prevent improper use of the summons and aid in the disclosure of helpful evidence which would prevent his prosecution all within the meaning of *U. S. v. Donaldson*, 1971, 400 U.S. 517, 523, 530, 91 S. Ct. 534, 538, 542?

Questions Presented

4. In a 26 U.S.C. 7201 specific item prosecution, must government aid defendant in proving deductions allowable under *U. S. v. Sansone*, 1965, 85 S. Ct. 1004, 1010, 380 U.S. 343, 352, when his records have been stolen previous to I.R.S. contact and investigation and does deliberate failure to do this qualify as a suppression of evidence within the meaning of *Brady v. Md.*, 1963, 373 U.S. 83 and its progeny?.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (4th Amendment to the United States Constitution)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (5th Amendment to the United States Constitution)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtain-

ing Witnesses in his favor, and to have the Assistance of Counsel for his defense. (6th Amendment to the United States Constitution)

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue Tax, or collecting any such liability, the Secretary or his delegate is authorized. . .

(1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) to take such testimony of the person concerned, under oath, as may be relevant to such inquiry. (26 USC 7602)

Service of summons—A summons issued under Section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the per-

son serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records or other data are described with reasonable certainty. (26 USC 7603)

In response to a number of inquires the Internal Revenue Service described its procedures for protecting the constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns

a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the constitutional rights of all persons.

(IRS News Release No. 897, October 3, 1967, 1971 CCH Federal Tax Reporter, Volume 6, paragraph 5709.1148, page 64,037.)

STATEMENT OF THE CASE

This case concerns the appeal of Joseph A. Nemetz (hereinafter called defendant or taxpayer) from his 26 U.S.C. 7201 (willful and knowledgeable filing of fraudulent income tax return) sentence.

Taxpayer was indicted February 27, 1969, tried from January 16, 1970 until February 6, 1970 (Rabe F. Marsh, Jr., C. J. and a jury), was convicted February 6, 1970 on all counts (1047a)[1] and sentenced (1050a-1055a) the same day.

The five count indictment charged that (12a-16a):

(1) In 1962, defendant reported taxable income of $3,252.67 but actually should have reported taxable income in the amount of $26,984.40.

(2) In 1963, defendant reported taxable income of $2,906.91, but actually should have reported taxable income in the amount of $33,380.43.

(3) In 1964, defendant reported taxable income of $337.35, but actually should have reported taxable income in the amount of $7,914.47.

(4) In 1966, defendant reported taxable income of $5,037.94 but actually should have reported taxable income in the amount of $65,295.91.

(5) In 1967, defendant reported taxable income of $4,083.98 but actually should have reported taxable income in the amount of $14,774.88.

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[1] "A" references are to petitioner's Appendix printed as a part of his brief in the Third Circuit Court of Appeals.

The government proceeded on the theory of specific item.

Defendant did not take the stand but did present witnesses in his defense.

His main attack was directed at the method by which special agents of the IRS had collected oral admissions and records from him and then used this information to assemble the evidence which was presented at trial.

Vernon B. Carpenter (Carpenter) was the special agent responsible for preparation of the case.

Defendant and Carpenter first met when the latter interviewed him October 25, 1967 about a $700 check plus his possible business association (353a, 358a, 419a, 425a-431a) with a Braddock numbers man named Plopi, now deceased.

Because of information supplied by an informer (474a) who was involved with defendant (472a) in a transaction involving a Mrs. Cooley (431a-485a), Carpenter was assigned in March, 1968 (352a, 361a, 435a) to investigate defendant's tax affairs for the years 1964-1966 (352a-353a, 545a).

Carpenter's first contact with defendant was a May 2, 1968 telephone conversation which he detailed (352a-353a) first to the Court in the unsuccessful (566a-567a) Jackson v. Denno hearing (348a) and then to the jury (545a):

> "I told him that I had been assigned his 1964, '65, and '66 income tax returns for investigation, that I would like to set an appointment so we can get together and discuss the situation with him. And I told him at that time I would like to see his can-

—celled checks and books and record which he may have available."

When Special Agents Carpenter and Hildun (353a) arrived at defendant's place of business, he already had his records available in a cardboard box (357a, 415a). These government representatives then identified themselves as special agents, displayed their credentials and badges of office (356a) and gave defendant a partial Miranda warning (353a-355a).

"Well, I told Mr. Nemetz that as a special agent it was my duty to investigate possible criminal income tax violations. I also informed him that I had been assigned to investigate his income tax liability for the years '64, '65 and '66, and I told him that under the Constitution of the United States he had the right to refuse to answer any questions, furnish any information or submit any documents which he felt might tend to incriminate him. I also told him that any information which he did furnish or any documents which he did submit could be used against him in any criminal action that might be undertaken.

As I was finishing my statement to Mr. Nemetz, he told me he understood he also had the right to have an attorney *present during the interview and I told him that was correct, he did have the right to have an attorney present during the interview.* I then asked him if he wished to proceed with the interview without an attorney. He said he did, and so I asked him questions relative to his financial and income tax liability.

Q. Did you ask him if he understood his rights?

A. Yes, I did. He said that he did." (353a-355a) (Emphasis supplied.)

Then they interrogated defendant under oath (355a-359a) asked for and obtained his records (359a, 546a et seq.) and used this oral and written material to build the case presented against defendant at trial (355a-358a, 515a, 517a, 519a, 558a-560a, 367a, 365a, 554a), see generally Question No. 2 for full details and testimony references).

Defendant attacked use of the testimony because of Questions 1 and 2 set forth in this Petition. Specifically, he stated that the May 2, 1968 interview violated an IRS directive which imposed mandatory warning procedure on Carpenter. This issue is taken up in Question No. 1 (p. 13, infra).

Defendant also stated that both interviews were a "critical stage" which required full *Miranda* warning even though he was not in custody. This issue is taken up in Question No. 2.

Defendant also took the position that since the relationship between him and his bank was confidential that the Revenue Service had no right to examine the records without the service of a 7602 summons subsequent to which he had the right to intervene and participate especially when he asked for this by written communication. This issue is taken up in Question No. 3.

The trial judge dismissed taxpayer's objections without oral argument (see Opinion, p. 75, a panel of the Third Circuit affirmed, p. 85, and a petition for a rehearing and suggestion for rehearing before the Court en banc was denied, p. 97).

REASONS FOR GRANTING THE WRIT

1. Is a new trial mandated when a special agent of the Internal Revenue Service deliberately violates a procedural directive of his agency by not clearly disclosing his criminal function at the initial contact with the to-be-investigated taxpayer within the meaning of U. S. v. Heffner, 1969, 4 Cir., 420 F. 2d 809, and cases cited therein and U. S. v. Leahey, 1 Cir., 1970, 434 F. 2d 7?

Defendant's May 2, 1969 motion (4a) to suppress which Senior Judge Gourley on July 22, 1969 directed be decided at trial (see docket entries, 2a), declared:

> "(j) The oral confessions and records of defendant were obtained in violation of regulations of the Internal Revenue Service and in violation of its internal directives."

Special Agent Vernon B. Carpenter (Carpenter) discussed his first contact with defendant both at the requested but decided adverse to defendant (566a-567a) *Jackson v. Denno* hearing (348a) and with the jury present (543a-544a). (Although assigned March 30, 1968 (352a, 361a) his first attempted contact with Nemetz was by phone call made May 2, 1968 to defendant's place of business).

Defendant was out, but later obeyed Carpenter's direction to call him back (352a, 416a) at which time Carpenter recalls (352a-353a):

"I told him that I had been assigned his 1964, '65 and '66 income tax returns for investigation, that I would like to set an appointment so we can get together *and discuss* the situation with him. *And I told him at that time I would like to see his cancelled checks and books and records which he may have available.*" (All emphasis supplied.)

Carpenter gives the identical testimony before the jury (345a).

Defendant agreed to meet at his place of business on May 6, 1968 at 9 a.m. at which time Carpenter and Special Agent Hildun arrived (353a), identified themselves as Special Agents, showed their badges (356a) and credentials, gave defendant a partial *Miranda* warning (353a-355a), interrogated him[*] (355a-359a) "relating to his financial background and to his income tax returns for the years under investigation" and then asked for and took with them "for further examination" (359a) the books and records which defendant had ready for them "in a cardboard box" when the Special Agents arrived (357a, 417a). Carpenter gave the identical testimony to the jury (346a et seq.).

Carpenter is alerted to a 1968 Internal Revenue Service warning release (368a) recalls its directions (369a-370a) and agrees to secure a copy for defense examination (371a).

He admits (377a-378a) that his group supervisor directed full Miranda warnings be given "when you are

[*] The full legal impacts of this interview are discussed in the next question (23).

seeking records from the taxpayer" (378a). Although declaring it to be a suggestion rather than a directive (378a), he recalls:

> "It was our policy if we were going to obtain books and records from the taxpayer to advise him that he had the right to refuse to submit those records for examination." (377a)

However, he admits his order forecloses use of deceit, trickery or misrepresentation of the purpose of the investigation (406a) and that he did not advise defendant on May 2, 1968 that he was not required to meet with or produce records for him[3] (416a-417a) or "give him any warnings at all. . ."

Although he recalls a prior contact with defendant on the Plopi investigation (353a, 419a) at which time he identified himself as a Special Agent, he admits that defendant was not then advised he was a criminal investigator nor can he say that defendant then or now knew this to be the Carpenter function[4] (420a).

Exhibit K (501a-503a) clearly directs:

> "(a) On initial contact with the taxpayer, IRS special agents are instructed to produce their creden-

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[3] "Q. At that time you didn't tell him he didn't have to *give them to you, did you?*

A. I did not." (417a)

[4] "Q. He had no way of knowing you were a criminal investigator, did he?

A. Well, I don't know.

Q. But you didn't at that time tell him you were assigned to investigate possible criminal activity on his part, did you?

A. I did not." (419a)

tials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'" (1079a)

Defendant strenuously suggests that this order, issued October 3, 1967, controls defendant's May 2, 1968 "initial contact" by phone and urges the Court to reject Carpenter's claim that only in person face-to-face contacts are covered (421a-422a).

Defendant argues that the following testimony is a clear showing, that Carpenter used the phone to avoid his "first contact" obligation especially in light of his admission that he would have followed his October 3, 1967 orders if the phone had not been used (423a-424a).

"A. Now, I asked him what would be a convenient time for us to get together and discuss the matter.

Q. You didn't tell him that he didn't have to discuss it, did you?

A. No, I did not.

Q. And you didn't tell him that he could hold back things if they tend to incriminate him, did you?

A. No, I did not.

Q. And you didn't tell him that he had a right to have a lawyer there when you were going to come and see him at the convenient time, did you?

A. No, I did not." (420a-421a)

"Q. And also he stated that he would be available in his warehouse at 307 Corey Avenue, Braddock, Pennsylvania, at 9 a.m. on May 6, 1968. I informed Mr. Nemetz that at that time I would

like to look at his books and records, cancelled checks and bank statements pertaining to the years under investigation. Mr. Nemetz stated he would have the records available.

A. That's correct.

Q. Now, you didn't tell him in that interview that he didn't have to bring the records in, did you?

A. No, I did not.

Q. Nor that if they tended to incriminate him he wouldn't have to give them to you?

A. No, I did not.

Q. Why didn't you tell him then? Why did you wait until you were alone in the office? You had showed him your badge and told him what your authority was and when he had everything there available for you, why, Mr. Carpenter, rather than tell him on May 2, so he then could have consulted a lawyer and made an independent decision whether he was going to cooperate with you or not? What did you wait for?

A. Well, the conversation there was over the phone and we do this on our first personal contact with the taxpayer.

Q. What you do then, you first tell the taxpayer to bring the records in and then when you are alone with him and he has them there and you show him your badge and tell him you investigate criminal trouble and in which he may become involved, then you say, 'Listen, you don't have to let us see that if you don't want to.' Is that the way you fellows work?

A. I called the taxpayer, made the appointment, advised him of his rights when I talked to him in person, that's correct.

Q. But why didn't you advise him of his rights before he got his records together for you so that you knew then it would be harder to say no? Why did you wait until he had everything there for you, Mr. Carpenter?

A. I waited until I talked to him. There was no—" (421a-422a)

"Q. Why?

A. There was no particular reason. Our instructions are that on the first personal contact we would advise the taxpayer of his rights.

Q. Well, wasn't that contact over the phone?

A. I wasn't—I told the taxpayer then that I had the investigation.

Q. Let me ask you this: Say he had been home May 2 and there he was, would you have advised him that he didn't have to get those records together or would you have given him the same story you gave him over the phone and then when you were there alone with him and he had the records, give him his warnings? What would you have done if you saw him personally on May 2 instead of over the phone?

A. I would have advised him of his rights because then I would have wanted to ask him certain questions.

Q. Well, he would have had the records then, would he?

A. Well, I needed the records. I was still asking questions concerning his financial condition.

Q. He would have had the records then, would he?

A. I don't know where he would have had them, Mr. Brunwasser.

Q. If you see him personally, would you tell him 'Mr. Nemetz, you don't have to get those records together?' Or would you have waited until he got them together?

A. I would have told him he didn't have to submit the records, correct.

Q. Well, then, there really is no difference, then, between talking to him over the phone or face to face as far as giving him the benefit as far as his so-called rights are concerned, isn't that right?

A. No, that's not right. I did not ask him any questions over the phone or attempt to get any information from him except to arrange an appointment."[5] (423a-424a)

Defense counsel argues to the Court:

"I think that was deceptive to call him up on May 2, and give him no warning and tell him to have books there and then when all the books were there and they were alone they show their badges and say, 'Now, we would like to have the books, Mr. Nemetz.'

"That takes a lot more power to resist than if over the phone he said, 'Incidentally, you don't have

[5] However, on this phone conversation by agreeing to the appointment, defendant admitted that records were available.

to give me the books if you don't want to. You can go see a lawyer if you want to.' When he came there on the 6th there might not have been any books there." (489a-490a)

The Court responds:

"I think I disagree with you but I am going to think about it over the weekend and maybe you can give me some authorities." (490a)

Defendant cites Fraternal Order of Eagles and the *Johnson* case, the exact citations to which were given over the phone as instructed (491a).

However, the Court subsequently holds the warning proper (479a). Defendant preserved this issue by paragraph 2 of his new trial motion. The lower Court opinion (1083a) does not discuss it.

Defendant respectfully suggests that the meaning of "first contact" clearly covers the phone conversation.

The Random House Dictionary of the English Language defines "initial" (p. 732) as "of or pertaining to the beginning, the initial step in a process." In defining "contact" (p. 315), it says "to communicate with" and gives as an example "will contact you by mail or by phone."

Defendant respectfully suggests that Carpenter knew exactly what he was doing by making the phone call in order to circumvent his absolute direction to advise defendant that he was not required to cooperate by meeting, discussing, obtaining or turning over the records.

This situation was met head on by the 4th Circuit Court of Appeal in *U. S. v. Heffner*, 1969, 420 F. 2d

809, where a conviction of violating 26 U.S.C. 7205 (false and fraudulent wage withholding statements) was reversed.

There, the special agents interviewed defendant previous to the October 3, 1967 directive which is the subject of this very case. Subsequently, they had a second interview but did not follow the requirements of the directive. In reversing the conviction even though a new trial would probably result in another conviction, the 4th Circuit declared (420 F. 2d at 811):

> "An agency of the government must scrupuously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."

U. S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, plus two other U. S. Supreme Court cases and similar holdings in the 4th, 5th, 2nd and District of Columbia Courts of Appeal are cited as authority (420 F. 2d at 812).

The dissenting opinion of Judge Bryan indicates that this point was not even raised in the oral argument or the brief filed by defendant. *U. S. v. Leahey*, 1 Cir., 1970, 434 F. 2d, 7, is in accord with *Heffner* on the October 3, 1967 directive (p. 7).

Defendant respectfully urges the Supreme Court of the United States to grant certiorari and reverse the conviction because of Carpenter's failure to follow the mandatory instructions of the agency from which he derives his only authority to take any action."

Defendant argues proper procedure mandates that Carpenter phone defendant and ask for an appointment

merely to see him. Then, he could give the warning required by the October 3, 1968 directive and his conduct would have been beyond attack.

The 1st and 4th Circuit Courts of Appeal have ruled that violation of this Internal Revenue directive mandates reversal of conviction. Although the matter was noticed by the Third Circuit Court of Appeals in *U. S. v. Jaskiewicz*, 1970, 433 F. 2d 415, fn. 10, it was not applied because the directive post-dated the factual situation there involved. However petitioner raised the specific issue in his appeal.

The Third Circuit Court of Appeals, although not specifically mentioning this attack by petitioner, did reject it by ruling "the other points raised by Nemetz have been carefully considered, and we find them lacking in merit". (Opinion, p. 89).

Petitioner respectfully suggests that the Third Circuit Court of Appeals is in conflict with the 1st and 4th Circuit Courts of Appeal as to whether or not an Internal Revenue directive must be obeyed. Petitioner also suggests that this is ground for granting of certiorari under United States Supreme Court Rule 19-1(b).

Leahey, 434 F. 2d at 10, recognizes but disagrees with *Cohen v. U. S.*, 8 Cir., 405 F. 2d 34, 39, where that Court of Appeals declared its policy toward a November 26, 1968 IRS directive giving full *Miranda* rights to be that it "will be among the factors considered by the Court in determining whether the nature of an investigation has been misrepresented." (405 F. 2d at 39).

Petitioner respectfully suggests that this conflict between the First and the Fourth Circuits and the Third and

the Eighth Circuits should now be resolved by approval of Leahey's reasoning (434 F. 2d at 11) that when a federal agency sets a policy of uniform action and advises the public to rely thereon, agents who disobey should be reprimanded by loss of the evidence.

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2. When special agents of the Internal Revenue Service confront a taxpayer for the purpose of obtaining oral admissions plus his written records for use in the investigation they are then conducting into his affairs, is this a "critical stage" which mandates the right to counsel warning within the meaning of Coleman v. Alabama, 1970, 90 S. Ct. 1999, 2002, 399 U.S. 1, 7; U. S. v. Wade, 1967, 87 S. Ct. 1926, 1930-1931, 388 U.S. 218, 222-223, and, if so, has defendant waived this right under the fact circumstances of this case when examined in light of Johnson v. U. S., 330 U.S. 10, 12; Amos v. U. S., 1920, 225 U.S. 313, 315, 317, and Von Moltke v. Gillies, 1948, 332 U.S. 708, 724?

The trial judge found the conduct of defendant with Carpenter and Hildun voluntary and refused to suppress the evidence (478a, 436a, 560a, Opinion, pp. 1084a-1085a).

Before the May 6, 1968 interview, Carpenter had no evidence that defendant had understated income or interest (N.T. 79). When his conversation was completed (355a et seq.) he knew the name of defendant's accountant (355a) and the identity of his banks (357a-358a).

From the First Federal Savings and Loan (First Federal) bank records (358a) he obtained the names of 50 unreported customers (515a, 517a, 519a) the unreported interest (558a-560a) the St. Brendan's $20,000 lead (367a) plus the $39,342 (365a, 554a) undeclared Braddock income and undeclared money (555a) received from the six customers whose names appeared in the books which defendant made available (357a) and permitted Carpenter to take with him (358a) and photograph (366a).

Defendant's tax returns contained no reference to the First Federal accounts.

Examination of defendant's records confirmed that the St. Brendan income was unreported (384a-385a, 558a), the Cooley item which concerned Carpenter (444a), and opened the investigation was not entered (457a, 459a, 460a, 474a-475a), income from 56 customers was either not (554a-555a) or undisclosed (555a), $39,342 received from Braddock (558a) and interest income was not declared (558a-560a) and that the spiral notebook total for each year was almost identical to the corresponding Schedule C (552a-554a).

From the oral discussion Carpenter gained admission that the returns reflected all income and expenses (355a) and "a complete list of his gross receipts" (356a-357a) plus the $80,000 grandfather gift (557a-558a) which proved so damaging at the trial. (See discussion of this issue in question 8, infra.)

The personal interview with Accountant Viott helped build the case and laid the groundwork for this witness's adverse trial testimony (289a-344a).

Obviously, if the oral and written admissions were improperly secured, the case is over (49a-50a; 1025a).

In his motion to suppress (4a) and at trial; defendant unsuccessfully resisted this evidence because

(a) he did not understand his 4th, 5th and 6th Amendment right to refuse cooperation;

(b) deceit, guile and misrepresentation was used by Carpenter to secure it; and

(c) he was overwhelmed by the power of the badge and display of authority used by the investigating government representatives.

What this all comes down to is the failure of Carpenter to advise defendant of his right to consult counsel before making a decision to give or refuse cooperation at this *critical stage* of the proceeding.

Without the advice of a knowledgeable tax attorney, defendant could not and did not understand that his cooperation would lead him to the jailhouse door (see February 10, 1970 docket entry, 3a).

(A) Carpenter misled defendant both in advising him of his rights and in failing to disclose what he was looking for in the records he requested.

Carpenter is not the usual revenue agent. His wiretapping and other improper activities were the subject of a 1965 Senate investigation (427a, 924a, 903a, 906a, 907a, 911a-913a, see also 490a).

The October 3, 1967 Exhibit K, IRS news release (1079a), required Carpenter to advise defendant of his

right to "retain counsel", before anything was said or done. It speaks in clear, understandable and unambiguous language:

> "On initial contact with the taxpayer, IRS special agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'"
>
> "If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the special agent is required to advise the taxpayer of his constitutional rights to remain silent and to retain counsel."

Defendant suggests that this is exactly what Carpenter was doing at the May 6, 1968 interview (354a-355a) and that his conduct in this respect was not a kindness but a mandated duty. The order from his group supervisor (377a-378a), the office policy (505a) plus the use of Exhibits I and J (497a-502) corroborates the practice in this district.

Defendant suggests that Carpenter's position that the May 6, 1968 interview did not become a full-blown investigation until May 9, 1968 (504a) be rejected. *Mathis v. U. S.*, 88 S. Ct. 1503, 1504, 391 U.S. 1, 4 (refusal of court to believe that visit was routine when criminal investigation followed eight days later).

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[1] Defendant suggests Carpenter's statement, "It is my duty to investigate possible criminal (354a) income tax violations" (353a) is not the same thing and should fall under the discussion in Question I, *supra*.

Reasons for Granting Writ

Defendant urges the Court to declare the May 6, 1968 meeting to be subject to the authority of Question 1, supra, suppress the evidence and grant a new trial.

(B) Carpenter admits he is instructed "not to use trickery or misrepresentation or deception in obtaining such evidence or in explaining the taxpayer's or the principal's constitutional rights or the purpose of the investigation" (406a, 488a, see written directions, 1062).

Even assuming that he was not required to advise about the right to counsel, he intentionally misled defendant (398a-399a) when he did not correct his mistaken belief that an attorney was allowed only "during the interview" (354a-355a) as distinguished from prior to it. Carpenter recalls his advice to defendant both at the *Jackson v. Denno* hearing (354a-355a) and in the actual trial (546a).

> "Well, I told Mr. Nemetz that as a special agent it was my duty to investigate possible criminal income tax violations. I also informed him that I had been assigned to investigate his income tax liability for the years '64, '65 and '66, and I told him that under the Constitution of the United States he had the right to refuse to answer any questions, furnish any information or submit any documents which he felt might tend to incriminate him. I also told him that any information which he did furnish or any documents which he did submit could be used against him in any criminal action that might be undertaken.
>
> As I was finishing my statement to Mr. Nemetz, he told me he understood he also had the right to

have an attorney *present during the interview and I told him that was correct, he did have the right to have an attorney present during the interview.* I then asked him if he wished to proceed with the interview without an attorney. He said he did, and so I asked him questions relative to his financial and income tax liability.

Q. Did you ask him if he understood his rights?

A. Yes, I did. He said that he did." (353a-355a)

Although Carpenter will not admit what advice counsel would have given defendant if he had the courage to tell the then present and ready to go agents to wait while he inquired (383a-384a), he does admit that the average member of a bar is not qualified to give advice in the tax area (401a). Thus, defendant believes that government must advise him to consult a tax attorney if he exercises this privilege at all.

(C) Carpenter's failure to advise defendant specifically why he was there and what he was after was not fair play. Regardless of the warning[7] he received, de-

[7] The U. S. Supreme Court speaking in *Columbi v. Conn.*, 1960, 367 U.S. 568 observed that ". . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statements to police under any circumstances."

[8] The Court (381a) directed this line of interrogation not take place when the jury returns.

[9] Defendant did not mention having received any warnings in his almost contemporaneous discussion with Vioit (366a-369a) and special agent McMahon (537a-542a).

fendant would have been put on notice that he was involved in serious difficulty if he had been told:

(1) Preliminary inquiry had been made from Special Agent McMahon about the St. Brendan and Braddock jobs and that Carpenter was interested if this income was reflected in the books (407a).

(2) That an informer (435a-466a, 474a-475a) had alerted the Revenue Service to the Cooley deal (480a, 488a, 535a-536a) which triggered the 1964 to 1966 investigation (451a, 457a) and that Carpenter was looking to see if this money was reported in the books (451a) for the year 1967 (456a) plus the possibility of criminal prosecution if it was not there (452a-453a).

(3) That the 1967 Cooley year was also to be investigated (457a, 459a-460a, 464a-466a) or that examination of the records might result in opening 1962 and 1963. His explanation that the lack of the 1967 return before defendant gave it to him (459a-460a) caused that year not to be opened should be rejected when he admits he had this return with him when he left defendant (462a-465a, 466a).

(4) That the records plus oral admissions would be used as a basis for followed-up interviews with the people plus banks there disclosed (395a, 396a, 403a).

(D) Carpenter properly admits defendant's failure to understand the advice he gave him would render it worthless (389a). Defendant argues that a reading of this record clearly demonstrates that Carpenter's instructions were insufficient to permit defendant to knowingly and intelligently waive his rights of non-cooperation and non-disclosure because

(1) He did not discuss the elements of the crime or the government's burden of proof therein (393a, 402a 403a).

(2) He did not distinguish between the elements of tax versus ordinary criminal prosecution and procedure (676a-677a) and the inability of the non tax oriented attorney to advise in this field (401a).

(3) He did not tell him how difficult it is to convict without records.[10]

(4) He did not tell him third parties and banks would be investigated if defendant disclosed them (395a-396a) and that this might lead to his criminal prosecution (403a).

(5) He did not properly advise of the right to consult counsel before deciding if he should cooperate and what help counsel could give (383a, 388a-389a) in making this decision (354a-355a, 371a-372a, 545a-546a) even though it was policy to do so (377a) if records were requested.

(6) He did not define what he meant by "gross receipts" (356a-357a, 531a).

(7) He did not define the meaning of "tend to incriminate" (391a, 410a-411a, 705a). Neither Carpenter nor Hildun, in fact, knew the meaning of this phrase, the former stating that it means "show guilt" (391a-392a) and that latter (708a) that it shows some violation of the criminal law.[11]

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[10] Defendant was not indicted or tried for 1965, the year for which he gave no records to the government (402a).

[11] "'Tend to incriminate' need not show guilt. It must only furnish a link in the chain of evidence the government will

(E) It is respectfully suggested that defendant was overwhelmed by the agents' show of authority and that the jury should have been instructed on this issue.

On May 2, 1968, Carpenter asked for defendant's records (352a-353a). On May 6, 1968, they overwhelmed him with a show of identification and badge (355a) to obtain oral admissions, waiver of the right to counsel plus records (359a). They took his testimony under oath and used this evidence to convict him (412a-413a).

The conduct of Special Agent McMahon to whom defendant turned for aid (537a) was misleading in light of his failure to disclose Carpenter had asked him in March about St. Brendan's and Braddock (541a).

Defendant objected to all evidence before the trial began (49a-50a); before Carpenter was sworn (351a), during trial (535a-540a) and after conviction (N.T. Paragraphs 12, 38, 51, 52). He raised the *Miranda* and the involuntary admission cases (348a-349a); psychological coercion and the critical stage of the proceeding (349a) cases cited *Johnson v. U. S.*, the power of the badge case to the trial judge (350a).

The Court, after ruling out cross-examination on the Cooley and Plopi matter, advised defendant that the only

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eventually produce against defendant at trial." *Hoffa v. U. S.*, 87 S. Ct. 408, 414, footnote 7, 385 U.S. 293, 304; "a reasonable probability that it might furnish a link in a chain of evidence which could subject the taxpayer to criminal prosecution. The information need not be of such import as to raise the likelihood of conviction." *Convictions, Searches and Seizures in Tax Cases*, Norman Redlich, 10 Tax Law Review 191, 195.

chance he had to win on the voluntary issue was to encourage Carpenter to change his testimony (568a). Since this obviously could not be done, the instruction prophesied the Court's thinking and forthcoming decision on this vital defense.

Whether defendant's investigation began in March, 1968 (435a) because an informer (474a) associated with him (472a) in the Cooley matter (431a-485a) or on October 25, 1967 (473a) when Carpenter was talking to him (425a-431a) about his connection with Plopi, the Braddock numbers man (429a-430a), was important in assessing the impact of the October 3, 1967 Exhibit K directive (1079a), Carpenter's general credibility (432a) and whether he was guilty of deceit (433a).

Since defendant was directly involved with defendant in the Cooley matter (472a), *Roviaro v. U. S.* (1957), 353 U.S. 53, on which defendant specifically relied (432a-433a, 434a, 435a, 472a, etc.) would appear to require this person be identified so defendant could use him for possible attack against the Cooley story.

It is respectfully suggested that the trial judge erred when he instructed defendant not to interrogate Carpenter on this issue when the jury returned because the evidence came out on cross-examination (473a-479a, 481a-482a, 484a, 566a-567a) even though government did not intend to make reference to it (474a, 481a).

The jury was entitled to hear this evidence in order to understand the entire picture and purpose behind the May, 1968 Carpenter interviews (481a-482a).

"It is true that the bounds of proper cross-examination must necessarily lie within the sound discretion of

the trial court" but ". . . cross-examination of a witness may embrace any matter germane to the direct examination qualifying or destroying it or tending to develop facts which have been improperly suppressed or ignored by the party who was called as a witness." *Sleek v. J. C. Penney Co.*, 3 Cir., 1963, 324 F. 2d 467, 473-474, 475.

It is respectfully suggested that examination of Carpenter on the Plopi and Cooley matters was within the bounds of propriety and that the Court should not have barred bringing this to the attention of the jury, so that the entire picture could be assessed in evaluating what weight to give Carpenter's testimony, especially since he was the main government witness.

The May 2, 1968 phone call at which defendant admitted he had records available and the May 6, 1968 face to face meeting where Carpenter took these records and interrogated defendant under oath about his personal and financial affairs cannot be separated in deciding whether he talked plus acted voluntarily. *Clewis v. Texas*, 1967, 87 S. Ct. 1338, 1339, 386 U.S. 707, 708; *Boulden v. Holman*, 1969, 89 S. Ct. 1138, 1139, footnote 1, 394 U.S. 478, 479.

Fair play would require that no request be made for the records until the parties are face to face and defendant has been given at least the cautions required by the October 3, 1967 memo (1079a) or, if this Court directs, the full Miranda warning.

By producing his records in the cardboard box, defendant had already admitted their existence. What good was the warning then that he need not do so?

With the agents there displaying their badges and credentials of office, it would take a strong defendant, indeed, to refuse cooperation (422a).

Defendant urges this Honorable Court to rule that he had an absolute constitutional right to be warned of his privilege to consult counsel *before* he made a decision to give or to withhold cooperation and that his cooperation was secured by deceit plus the power of the badge which made a request become a command.

A. *Miranda v. Arizona*, 1966, 86 S. Ct. 1602, 1628, 1640, 384 U.S. 436, 475, 498, did not create new law.[12] It merely recognized the factors which courts have always evaluated in deciding if a defendant's actions were voluntary and declared that when a person is significantly deprived of his freedom, the giving or not giving of the traditional warnings are no longer elements to be evaluated, but mandated procedure.

This is because "in custody" is held to be a "critical stage" as a matter of law and so a prophylactic rule is required.

Consultation with counsel *before and during* the interrogation must be "clearly" offered (86 S. Ct. at 1628, 384 U.S. at 475) to prevent coercion and/or misreporting of what he said plus provide his attorney as an at-trial witness in case of dispute.

Coleman v. Ala., 1970, 90 S. Ct. 1999, 2003, 399 U.S. 119, declared a not required state preliminary hear-

[12] Nemetz is aware that a panel of the Third Circuit held *Miranda*, per se, not applicable under certain circumstances, in *United States v. Jaskiewicz*, 433 F. 2d 445.

ing to be such a critical stage requiring a prophylactic rule. *Wade v. U. S.*, 1967, 87 S. Ct. 1926, 1931-1932, 388 U.S. 218, 222-225, declared the pre-identification lineup to require identical protection.

In ruling that 26 U.S.C. 7602 process would be enforced against partnership papers, the Third Circuit Court of Appeals in 1963 observed:

> "An appearance before a special agent is in the nature of an appearance in a criminal investigation." *U. S. v. Silverstein*, 314 F. 2d 789, 790.

Taking *Silverstein* and *Coleman* together it is respectfully suggested that the appearance before Carpenter was sufficiently identical to a preliminary hearing to invoke full Miranda protection. Defense counsel's research has not disclosed a controlling Third Circuit case. The closest discovered was *U. S. v. Remco*, 3 Cir., 1968, 388 F. 2d 783, 785, where the Circuit passed the problem because the confession involved ante-dated the *Miranda* decision.

Defendant respectfully suggests that close reading of *Wade*, *Coleman* and *Miranda* creates a definite impression that the United States Supreme Court is determined to prevent interrogation which concludes with defendant defenseless and deprived of any witness to aid him in contesting the state's version of what took place plus what he said or did. If an attorney can help, he must be offered and made available both before and during the questioning (90 S. Ct. at 2003, 399 U.S. at 9).

The *Coleman* Court opined:

> "It is central to that principle that in addition to counsel's presence at trial, the accused is guaran-

teed that he need not stand alone against the state at any stage of the prosecution, formal or informal, *in court or out* where counsel's absence might derogate from the accused's right to a fair trial." (90 S. Ct. at 2002, 399 U.S. at 7.) (Emphasis supplied.)

"It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

The Court then goes on to show what a lawyer can do at a preliminary hearing plus the inability of defendant to be aware of this available help (90 S. Ct. at 2003, 399 U.S. at 9).

The *Wade Court* (87 S. Ct. at 1931; 388 U.S. at 224), observed that most facts are marshalled before trial and that if the attorney is not present the accused's fate is sealed and the trial a mere formality. The Court is concerned that the trial not be "no more than an appeal from the interrogation" and observes that it is valueless "if, for all practical purposes, the conviction is already assured by pre-trial examination" (87 S. Ct. at 1931-1932, 388 U.S. at 226).

Additionally, the Court is concerned that defendant may not be able to take the stand without waiving his 5th amendment privilege against self-incrimination and the availability of a lawyer to do this for him is a substantial required right (87 S. Ct. at 1934, 388 U.S. at 231-232). In this particular case, defendant could not take the stand to deny what the agents had said. Defend-

ant believes that availability of a lawyer to do this for him would have changed the eventual outcome.

The *Wade* Court is additionally concerned that without counsel nobody at the interrogation has any interest in protecting defendant so that the trial itself, is merely a rehash of facts developed by the investigating officers (87 S. Ct. at 1937, 388 U.S. at 235).

It is not necessary that defendant be in jail for this critical stage rule to apply. *Orozco v. Texas*, 89 S. Ct. 1095, 1097, 394 U.S. 324, 327 (bedroom held sufficient); *Massiah v. U. S.*, 1963, 377 U.S. 201, 203 (after indictment, improper to permit informer interrogate defendant in cooperation with government agents). Additionally, the Internal Revenue Service is subject to *Miranda* when defendant is in custody on another charge, *Mathis v. U. S.*, 88 S. Ct. 1503, 1504, 391 U.S. 1, 4.

Many of the Circuit Courts of Appeals which have discussed whether or not *Miranda* applies have approached the issue on the basis of whether defendant is in custody or significantly deprived of his freedom. Defendant does not believe the "critical stage" approach has been argued in any of these authorities (1085a).

Commentators approve of the full *Miranda* warning when the special agent appears on the scene: Paul L. Lipton, speaking at the 1968 Sixth Circuit Judicial Conference, 45 F.R.D. 323; *The Constitutional Right to Counsel in Tax Investigations*, 1965-1966, 33 University of Chicago Law Review 134; 76 Yale Law Review 1 (1966).

Justice Douglas, dissenting from refusal to grant certiorari in a case concerning interrogation by the Internal

Revenue Service in *Thomas v. U. S.*, 1967, 386 U.S. 975, 87 S. Ct. 1164, remarks that the interrogation is coercive, at a critical time, like a preliminary hearing and that the same complaints are constantly being filed in the Supreme Court.

Cases which have applied the full *Miranda* warning are: *U. S. v. Wainwright*, D.C., 1968, 284 Fed. Supp. 129 (*Miranda* applicable when special agent receives assignment); *U. S. v. Turzynski*, N.D. Ill., 1967, 268 Fed. Supp. 847, 850 (special agent must warn when investigation shifts from civil to criminal); *U. S. v. Kingry*, 19 A.F.T.R. 2d 762 (special agent must warn defendant of right to attorney); *U. S. v. Gower*, 1967, M.D. Pa., 271 Fed. Supp. 655, 658 (special agent must warn of right to counsel before question and answer session begins).

Justices Douglas and Black speaking in a concurring opinion in *Columbe v. Conn.*, 1960, 367 U.S. at 640, and in particular; in footnote 2, observe that the warning to be silent and obtain counsel does not tell defendant anything he does not already know but is clear notice that war has been declared between the investigators and the defendant who has formally become the accused.

Thus, the time when war is declared should be the time when the warning should be given, and it is respectfully suggested that this is no later than when the special agent appears on the scene either in person or by phone.

The continuous statements of the special agents that the case is both civil and criminal is only a technique to deprive defendant of his constitutional right to the warning. This distinction has been classified as double talk in 76 Yale Law Review 1.

When Carpenter states "investigations could turn out to be a civil matter or it could turn out to be both civil and criminal but it can never turn out to be strictly criminal" (529a), he is merely stating that every criminal case must be civil because additional assessment is necessary to find a violation of 26 U.S.C. 7201.

It is respectfully suggested that the Court knows this to be a fact and that the policy of winking at what is obviously a direct violation of the law should now end especially since the Revenue Service is constantly taking advantage.

B. Defendant urges this Honorable Court to find as a fact that the on-the-surface innocent request by Carpenter for books of defendant when he was actually looking for income from St. Brendan's, Braddock and the Cooley matters plus the fact that he did not advise defendant that the 1967 returns were also the subject of the investigation is such a direct deception that the evidence must be suppressed.

Carpenter knew what he was after and intentionally did not advise defendant. If defendant was aware that the Cooley, St. Brendan and Braddock income was the subject of the investigation, he certainly would not have turned over the books and talked when he knew this would guarantee his prosecution. Additionally, it was deceitful for Carpenter to take the books and investigate 1967 plus Cooley when he advised 1964 to 1966 were the only years involved.

Trickery, misrepresentation or deceit vitiate the search and confession leaving the government exactly where it was before the impropriety took place. *Columbe*

v. *Conn.*, 1969, 367 U.S. 568 (officers investigating murder falsely charge defendant with breach of the peace so that they can hold him in custody and avoid advising him of his right to silence and counsel; conduct condemned, see also footnote 95); *Fraternal Order of Eagles v. U. S.*, 3 Cir., 57 F. 2d 93 (false representation of identity by prohibition officers to gain entry; evidence suppressed); *U. S. v. Sing*, D.C. N.Y., 1957, 149 Fed. Supp. 269 (agents do not disclose investigation of passport fraud; affirmatively claim another purpose; evidence suppressed even though turned over voluntarily); *Reineman v. U. S.*, 7 Cir., 1962, 301 F. 2d 267, 269 (revenue agents reexamine records for closed year that has not been reopened; defendant not advised it is a reexamination; assessed deficiency overruled).

It is obvious that Carpenter was looking for a confession and therefore his conduct "must be examined with the most careful scrutiny", *Spano v. U. S.*, 1958, 360 U.S. 315, 324.

It is respectfully submitted that Carpenter's phone conversation with defendant was a command rather than a request especially when given previous to any warning. He says, ". . . I would like to set an appointment so we can get together and discuss the situation with him, and I told him at that time that I would like to see his cancelled checks and books and records which he may have available" (352a-353a).

When the records were there, Hildun and Carpenter arrived, showed their badges and official credentials and then gave the warning which did not advise defendant that he could talk to a lawyer *before* he made any deci-

sion. With the agents and the records there, it is respectfully suggested that it would take a strong man, indeed, to call off the investigation and ask for the right to call an attorney for advice (422a).

Defendant would be justified in believing that any delay would aggravate the agents and necessarily prejudice their decision in deciding what to do with his case. It is a pressure which only a person who has been investigated by the IRS can feel.

(1) In holding acquiescence to the power of a search warrant not be voluntary, *Bumper v. North Carolina*, 1968, 88 S. Ct. 1788, 1792, 391 U.S. 543, 549, cites with approval in footnotes 13 and 14 the following cases which appear applicable to the present situation.

(a) *Johnson v. U. S.*, 333 U.S. 10, 12 ("I want to talk to you a little bit"; defendant's acquiescence held coerced).

(b) *Amos v. U. S.*, 1920, 255 U.S. 313, 315, 317 (defendant's wife admit men who say they are "revenue officers and have come to search the premises for violations of the revenue laws"; conviction based upon goods found reversed for violation of 4th and 5th Amendment rights to non-waived implied coercion).

(c) *Higgins v. U. S.*, D.C. Cir., 209 F. 2d 819, 820 (policeman asks defendant if he can talk to him in his room; defendant approved; when there "I asked him if I could look around"; conviction reversed and evidence suppressed as coercion).

(d) *MacKenzie v. Robbins*, 1965, S.D. Me., 248 Fed. Supp. 496 (no warrant of arrest or search

or probable cause; policeman identifies self and says "I would like to talk to you"; door opened and policeman enters without express invitation but without protest; habeas corpus issued to reverse conviction in state court as coercion; see cases collected at p. 501).

(e) *U. S. v. Marra*, E.D. N.Y., 1930, 40 F. 2d 271 (prohibition agents say they are going to inspect and do so without defendant's presence; conviction reversed and evidence suppressed even though sufficient facts for search warrant possessed previous to entry).

(f) *Judd v. U. S.*, D.C. Cir., 1951, 190 F. 2d 649, 651 (cases collected; in custody defendant asked whether "he minded us going over to his room and taking a look"; confession held coerced).[13]

Also relevant is the decision in *U. S. v. Polensky*, D.C. Vt., 1969, 300 Fed. Supp. 976, 979 (defendant stopped for traffic violation and in getting out of car is asked for gun which he turns over; held critical stage, counsel necessary and evidence suppressed; "Certainly a request to produce evidence that is central to the prosecution's case is a critical stage of the proceeding against the accused. The presence of counsel is an effective check on the unknowing relinquishment of 4th Amendment rights just as it is an effective check on the unknowing waiver of 5th Amendment rights.")

In fact, in *Berne*, supra, 412 F. 2d at 1062, the Court indicates that it might have suppressed evidence if the

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[13] This case was recently approved by the Third Circuit in *Government of Virgin Islands v. Berne*, 412 F. 2d 1055, 1058.

police did not have sufficient facts to sustain a conviction and were attempting to obtain them by the alleged claim of consentual search. In the present case, Carpenter had no evidence whatsoever to get the case going before he obtained the oral admission plus the records (N.T. 79).

(2) The compulsion and pressure can be mental as well as physical. It is respectfully suggested that not only the power of the badge but the pressures of maintaining respectability and not being disgraced in the community plus the hope that the revenue agents will only assess civil damages, and not bring criminal charges is sufficient coercion to cause the average person, never in trouble before, to cooperate and thus play into the hands of the revenue agents who know the rules.

Cases discussing psychological coercion are *Brady v. U. S.*, 1970, 90 S. Ct. 1463, 1470, 399 U.S. 742, 750; *U. S. v. Gower*, 1967, M.D. Pa., 271 Fed. Supp. 655, 660; *Davis v. North Carolina*, 1966, 86 S. Ct. 1761, 384 U.S. 737; *Martinez v. U. S.*, 380 U.S. 260, 85 S. Ct. 953 (333 F. 2d 405, 407, 9 Cir., 1964, where FBI wanted to talk to defendant remanded for more facts on the issue of consent or coerced); *Smith v. U. S.*, 1954, 348 U.S. 147, 153 (police pressure and resulting "strain and confusion" may vitiate confession, but not on facts in the case); *U. S. v. Calderon*, 1954, 348 U.S. 159, 164 (Court recognizes anxiety of taxpayer to cooperate and avoid criminal prosecution, *U. S. v. Blue*, 1966, 384 U.S. 251, 86 S. Ct. 1416 (issue of pressure to waive privilege against self-incrimination to avoid civil jeopardy assessment appeal which is pending in tax court held to be an issue for trial when coerced evidence is offered); *Shotwell Mfg. Co. v.*

U. S., 371 U.S. 341, 347-348 (confession must be free and voluntary; see Justice Black's concurring opinion at p. 384 and footnotes 24 and 25 collecting psychological pressure authorities); 7 Yale Law Review 1, 34 (pressure to waive privilege against self-incrimination to avoid civil assessment where IRS keeps investigation civil until ready to criminally prosecute discussed).

If defendant refused to display his books, Carpenter would have been justified by 28 U.S.C. 6851 and 6861 to make jeopardy assessment. To overcome this ex parte action, defendant would be required to waive the Fifth Amendment.

This type of pressure has been condemned in other cases and should be similarly treated here: *U. S. v. Kordel*, 90 S. Ct. 763, 770, 397 U.S. 1, 13 (evidence coerced under threat of civil forfeiture cannot be used in criminal prosecutions); *Garner v. Broderick*, 88 S. Ct. 1913, 1916, 392 U.S. 273, 278 (testimony given under compulsion of losing job suppressed); *Garrity v. New Jersey*, 1967, 385 U.S. 493, 496, 87 S. Ct. 616, 618 (choice between privilege against self-incrimination and waiver or loss of job held unconstitutional; subtle mental pressures condemned); *Spevaek v. Klein*, 1967, 385 U.S. 511, 87 S. Ct. 625 (attorney disbarred when he raises 5th amendment privilege as blockade to production of records; reversed); *U. S. v. Jackson*, 1968, 88 S. Ct. 1209, 1216, 390 U.S. 570, 582 (kidnapping act encourages plea to avoid risk of death at jury trial; needless chill on exercise of basic constitutional rights itself unconstitutional); *U. S. v. Thompson*, 1969, 89 S. Ct. 1322, 1329, 394 U.S. 618, 631 (welfare one year residence requirement chills right to travel into state; patently unconstitutional); 6

Columbia Law Review 1490, 1502 (threats by administrative agency to obtain compliance with illegal demand is bill of attainder).

(3) The method of obtaining defendant's cooperation must be evaluated in deciding whether or not the conduct was voluntary. *Jenkins v. Delaware*, 89 S. Ct. 1677, 1681, 395 U.S. 213, 221; *Johnson v. New Jersey*, 1966, 86 S. Ct. 1772, 1780, 384 U.S. 719, 731; *Davis v. North Carolina*, 1966, 86 S. Ct. 1761, 1764, 384 U.S. 737, 740; *Greenwald v. Wis.*, 1968, 88 S. Ct. 1152, 1154, 390 U.S. 519, 521 (lack of or inadequate warning goes to involuntariness); *Boulden v. Holman*, 1969, 89 S. Ct. 1138, 1139-1140, 394 U.S. 478, 480; *Frazier v. Cupp*, 1969, 89 S. Ct. 1420, 1425, 394 U.S. 731, 739; *Clewis v. Texas*, 1967, 87 S. Ct. 1338, 1340, 386 U.S. 707, 709; *Lloyd v. U. S.*, 5 Cir., 1955, 226 F. 2d 9, 15; *Swenson v. Bosler*, 1967, 87 S. Ct. 996, 997, 386 U.S. 258, 260 (court has duty to appoint attorney without defendant's request when right to attorney absolute).

Defendant urges the Court to find as a fact that the conduct of special agent Carpenter, even under the pre-Miranda tests deprived him of his constitutional rights guaranteed under the 4th, 5th and 6th Amendments to the Constitution of the United States.

C. Regardless of the findings of the trial judge, the Court of Appeals can determine the voluntary vs. involuntary issue after an independent study of the record. *Boulden v. Holman*, 1969, 89 S. Ct. 1138, 1140, 394 U.S. 478, 480; *Clewis v. Texas*, 1967, 87 S. Ct. 1338, 1339, 386 U.S. 707, 708. The burden of proof is on the government, *Bumper v. North Carolina*, 1968, 88 S. Ct. 1788, 1792, 391 U.S. 543, 548-549.

D. Even though the trial judge believes the conduct was voluntary, he has no right to direct a verdict requiring the jury make the identical findings even if the testimony is uncontradicted.

(1) The burden to convince the jury remains on government after a Jackson v. Denno hearing has been decided adversely to defendant. *Wade v. Yeager*, 3 Cir., 1967, 377 F. 2d 841, 844.

(2) 18 USC 3501 deals with admissibility of confessions and sets forth guidelines for the Court to follow. Subsection (b) details what should be considered in deciding the issue:

"The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his rights to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."

The Act further declares:

"The presence or absence of any of the above-mentioned factors to be taken into consideration by

the judge need not be conclusive on the issue of voluntariness of the confession.

> "If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and will instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

Not only did Judge Marsh not give this instruction but it is respectfully submitted that he should have been required to advise the jury concerning the standards of 18 USC 3501(b) so that they could make an intelligent decision.

In his charge of the voluntary issue, the Court merely says (1025a):

> "If you find any statements made to the agents on May 6, 1968, were not voluntarily made, then you would disregard everything which the agents said that the defendant told them and you would disregard the books and records the defendant gave to them and you would disregard all the facts which the agents uncovered as a result of that interview and from examining the defendant's notebooks and other records."

Defendant had previously objected to Exhibit 167, which is the summary of all the government evidence, and moved to strike it (716a, 732a-733a).

However, both the jury and the Court of Appeals can draw their own inferences from the facts. *Jackson v.*

Denno, 1963, 378 U.S. 368, 377 (coercion issue for jury if reasonable men could differ as to inferences to be drawn from undisputed facts); *Columbe v. Conn.*, 1960, 367 U.S. 568, 603-605 (issue of credibility for lower court inferences as to mental state of defendant which is the actual subject of appeal can be decided by appeal court); *Sims v. Ga.*, 1967, 87 S. Ct. 639, 643, 385 U.S. 538, 543 (defendant's testimony of abuse at unsuccessful suppression hearing undenied, but partially contradicted at trial; remanded for *Jackson v. Denno* hearing on voluntary-involuntary issue; thus credibility of uncontracted defense testimony still for trier of fact); *U. S. v. Wheeler*, 3 Cir. 1960, 275 F. 2d 94 (Marsh, J., in lower court; both government and defendant admit voluntary cooperation and deny deceit, coercion or false representation, held nothing for jury as a matter of law);[14] *Wright v. Rockefeller*, 1963, 376 U.S. 52, 57 (trier of facts must be permitted choice of conflicting inferences); *Rhoades, Inc. v. United Airlines, Inc.*, 3 Cir., 1965, 340 F. 2d 481, 485 (oral testimony can be rejected even if undenied); *Wooley v. Great Atlantic & Pacific Tea Company*, 3 Cir., 1960, 281 F. 2d 78, 80 (Judge Marsh) and *Nanty-Glo Boro v. American Surety Co.*, 1932, 309 Pa. 236, 238, affirmed for the proposition that binding instructions cannot be given on undenied oral testimony, the credibility of which must go to the jury.

E. Defendant did not knowingly and intelligently waive his right to counsel plus the other rights detailed above.

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[14] This is probably the case on which Chief Judge Marsh relied in directing that nothing was opened for jury consideration on the voluntary issue (566a-568a).

Although the investigating agent can preliminarily decide if constitutional rights have been waived, the final determination is still for the court. (*Miranda*, supra, 86 S. Ct. at 1634, footnote 55; 384 U.S. at 486.) The state has a "heavy burden" to show a knowing and intelligent waiver of any constitutional right (86 S. Ct. at 1628, 384 U.S. at 475). The Court will not presume a waiver from a silent record. *Boykin v. Ala.*, 1969, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712.

The doctrine of waiver has been concisely discussed in *Von Moltke v. Gillies*, 1948, 332 U.S. 708, 724 as follows:

> "To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and the circumstances engaged in thereof and all other facts essential to a broad understanding of the whole matter."

"The signing of a standard written waiver of counsel" is insufficient (332 U.S. at 728).

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against a waiver of constitutional rights, . . . and for a waiver to be effective, it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis*, 86 S. Ct. 1245, 1247, 384 U.S. 1, 4.

Reasons for Granting Writ

It is respectfully suggested that defendant could not have intelligently and knowingly waived his constitutional rights because by turning over the books and giving the oral confession he guaranteed that he would be convicted, as he was, in a Federal Court.

In discussing Criminal Rule 11 as applicable to a guilty plea on 26 USC 7201 prosecution the Supreme Court (*McCarthy v. U. S.*, 1969, 89 S. Ct. 1166, 1171, 1173; 394 U.S. 459, 466, 470-471), declared that defendant must understand the elements of the crime and the relation to law and fact to prevent the plea from being a mere ritual. It is respectfully suggested that the rule 11 in court protection should be applied to out-of-court conduct which is actually a plea.

Other authorities on the issue are *Berry v. U. S.*, 3 Cir., 1970, 412 F. 2d 189 (defendant pleads guilty, not told of effect on his parole, reversed); *Clzoga v. U. S.*, 10 Cir., 1967, 380 F. 2d 305 (jury must be told failure to understand is an element in deciding voluntary-involuntary issue, but instruction unnecessary as voluntary issue not raised at trial); *Boykin v. Ala.*, 89 S. Ct. 1709, 1712, 395 U.S. 238, 242-243 (theory of Rule 11 applied to state guilty plea; record must show lack of coercion, ignorance or failure to understand law in relation to fact); *Miranda v. Arizona*, 86 S. Ct. 1602, 1628, 1640, 384 U.S. 436, 475, 498; *Com. v. Stanley*, 1969, 251 A. 2d 681, 682, 214 Pa. Superior Ct. 118 (complex charge and requires intelligent waiver of counsel who could explain nature of crime, statutory offenses included, range of punishment, possible defenses and other essential facts necessary to understand.)

F. The jury must be instructed on this even without request. *Stevenson v. Boles*, 4 Cir., 1964, 331 F. 2d 939, affirmed per curiam, 379 U.S. 43, 85 S. Ct. 174; *Sproble v. Cal.*, 1951, 313 U.S. 181, 189 (non-representation by counsel is factor tending to involuntariness; oral confession should be cautiously received; jury must be advised concerning these elements); *Mullins v. U. S.*, 4 Cir., 1967, 382 F. 2d 258, 262 (jury must be advised concerning the issue even without request).

In conclusion, defendant urges the Court to find that on this record the confession was involuntary, defendant was tricked and coerced into making it, that he did not intelligently waive his rights and, even if everything previously is decided against him, the jury was not properly advised concerning the method by which they should determine the voluntary or involuntary issue and for these reasons the conviction should be reversed.

The panel of the Third Circuit Court of Appeals neglected to observe that defendant was not relying upon *Miranda v. Arizona*, 384 U.S. 438, 86 S. Ct. 1602, but arguing that the first interview was a "critical stage" of the proceedings as interpreted by *Coleman* and *Wade*. (See Petition for Reargument, p. 90.)

Petitioner respectfully suggests that the Internal Revenue Service and involved taxpayers should be illuminated concerning exactly what warnings are necessary and when they must be given before a special agent looking forward to indicting taxpayer begins his crucial interview subsequent to which the trial is only a ceremony.

Petitioner respectfully suggests that in a case where only loss of revenue is involved, he should receive treatment at least equal to that given murderers, cutthroats and perpetrators of other serious felonies.

3. Does a confidential relationship exist between a bank and its depositor and, if it does, must 26 U.S.C. 7602 process be served before the bank records are made available for IRS special agent examination and, if so, does the taxpayer have an absolute right, to notice that the summons has been served plus the opportunity to intervene and participate when the special agent interviews the witness so that he can prevent improper use of the summons and aid in the disclosure of helpful evidence which would prevent his prosecution all within the meaning of U. S. v. Donaldson, 1971, 400 U.S. 517, 523, 530, 91 S. Ct. 534, 538, 542?

This issue is raised in Paragraph 2(e) of Defendant's Motion To Suppress plus his at trial objection (93a). It was preserved for appeal by his new trial motion in Paragraphs 1, 2 and 60. It was not discussed in the lower Court opinion.

A. The Government produced six bank officers. Five, who were asked, declared the relationship between the defendant and his bank to be confidential and most stated that this is a rule acknowledged in the entire banking industry: Micenko (198a); Axon (214a); Markland (245a); Berger (261a); Lansinger (268a).

B. These bank officer-witnesses only restated what courts and commentators have overwhelmingly declared. The relationship between a bank and its depositors is confidential.

"Patton's Digest" prepared for, copyrighted by and used as the Bible of the American Bankers' Association,

declares that the relationship between bank and customer is secret.

> "A bank is under an implied obligation to keep secret the records of its depositors . . . ." (August, 1962 Supplement, p. 5, Sec. 19.)
>
> "A depositor is entitled to have the state of his account kept secret. . . ." (p. 4)
>
> "A bank should, as a general policy, conceal information received concerning its customers as confidential, which it should not disclose to others without clear justification" (Sec. 19(1), p. 619).

A bibliography beginning at page 627 collects numerous authorities classifying the relationship as "confidential", "verging on the professional".

In *Tournier v. National Provincial and Union Bank of England*, 1 K.B. 461 (1924); a bank which disclosed to the employer of its depositor that he was receiving money from a bookmaker causing him to lose his job was held subject to damages. The highest judicial Court in England said:

> "It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his accounts, . . ."

80 Banking Law Journal 28, published for the guidance of the banking fraternity, comments on scarcity of material because of traditional care of bankers, most of whom are, by voluntary agreement, subject to the Robert

Morris Associates Code of Secrecy (p. 28) and refers to *Tournier*, supra, indicating that it will probably be followed in the United States as a general proposition (pp. 29, 32).

Peterson v. Idaho First National Bank, 367 P. 2d 284, 1962, Idaho, collects authorities, all of which hold the relationship to be secret. There, defendant bank disclosed to depositor's employer that depositor-employee was passing N.S.F. checks and was declared responsible in damages.

73 Bankers Law Journal 163, 164 (1956) affirms the confidential relationship as does 25 Columbia Law Review 152, 154, 157, 158, indicating that *Tournier* will probably be followed here.

Also declaring the relationship secret are *Corpus Juris Secondum*, Banks and Banking, §71(c); John T. Morse, Jr., "*Law of Banks and Banking*" 6th Edition, Volume 1, Boston, Little, Brown and Company (1928) in §298(a); Michie, "*Banks and Banking*" Permanent Edition, Volume 5(b), The Michie Company, Law Publishers, Charlottesville, Virginia (1950), Chapter 9, §308, p. 186.

U. S. v. First National Bank of Mobile, D.C. Ala., 67 Fed. Supp. 616 (1946), modified on other grounds, 160 F. 2d 532, declares it to be "a fiduciary relationship" (67 Fed. Supp. at 624).

U. S. v. First National Bank of Fort Smith, W.D. Ark., 1959, 173 Fed. Supp. 716, 721 [15] agrees, but indicates that a Court Order justifies release of information.

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[15] This case was cited with approval in *U. S. v. Dauphin Deposit Trust Co.*, 3 Cir., 1967, 385 F. 2d 129.

Brex v. Smith, 1929, 104 N.J. Equity, 386, 388, enjoined the public prosecutor from examining police personal bank accounts due to lack of authority and remarked that the relationship was secret but subject to Court Order.

7 *Am. Jur.*, Banks, §196, p. 150, affirms the secret relationship between bank and customer. In addition, 12 USC 484 concerning "limitation on visitorial powers", in regard to national banks states:

> "No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the Courts of Justice, or such as shall be or shall have been exercised or directed by Congress, or by either House or by any Committee of Congress or of either House duly authorized."

If the Congress intended information to be freely given, it would not have passed this statute.

Similarly, Pennsylvania, in 7 Purdon Statutes 332, requires banking institutions make disclosure to the Department of Public Assistance, etc. If they were free to divulge the information, it would be unnecessary to pass legislation and enforce it by §333 declaring refusal a misdemeanor.

Few authorities exist. The reason is that banks do not voluntarily disclose, and, further, few lawsuits are brought because the depositor rarely discovers the breach of faith. However, no decision disclaiming the secret relationship has been found. The Court can take judicial notice of the general depositor understanding that his bank will protect him.

In other fields involving confidential relationships, the Courts have enforced secrecy.

Board of Trade of Chicago v. Christie Grain and Stock Co., 1905, 198 U.S. 236, 250, restrained defendants from divulging grain price statistics collected by plaintiff and sent by wire to confidential recipients who agreed not to disclose the information. The Court, after calling the information "a trade secret" declared:

> "The plaintiff does not lose its rights by communicating the results to persons, even if many, in confidential relations to itself, under a contract, not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

Associated Press v. U. S., 1944, 326 U.S. 1, 15, footnote 14, approved the above quotation verbatim.

McMann v. S.E.C., 1937, 2 Cir., 87 F. 2d 377, refused to enjoin plaintiff's broker whose data was accumulated, not from the customer, but from statistics openly reported on the Exchange, from divulging them to the S.E.C. lawfully investigating plaintiff's speculations thereon, because the information was public knowledge (pp. 378-379).

The Court distinguished *Brex. v. Smith and Hearst v. Black*, D.C. Cir., 87 F. 2d 68, because here the investigation was authorized. After intimating that the records might be property, the Court held the relationship between broker and client confidential. It further stated that the broker could be compelled to assert the privilege of the customer (87 F. 2d at 399).

In *Hearst*, supra, an illegal conspiracy between the Federal Trade Commission and a Senate investigating committee attempting to obtain copies of telegrams sent by plaintiff through Western Union, which refused to make them available to the Committee, was condemned by the Court, which advised that business information, including a letter transferred by mail or other means of communication, remains the property of the sender since recipient obtains it, not for publication, but only for the specific purpose for which it was transmitted.

As defendant's records could not have been examined against his will while in his possession, *U. S. v. Lefkowitz*, 1931, 285 U.S. 452, 466, the information should not lose this protection because the necessity of business places it in the hands of a bank. *Wilson v. U. S.*, 221 U.S. 372, 380, 382.

C. 80 Banking Law Journal 28 (1963), a reprint of 60 Michigan Law Review 781, and 14 Journal of Taxation 220 (1961) indicate that banks usually cooperate without service of summons and release information over the phone to Internal Revenue Agents. If this has occurred here, the evidence should be suppressed. No government witness disclosed how Carpenter first gained access to their records.

Neither bank witnesses (92a-277a), the prosecutor (107a), Carpenter (351a et seq.), or Hildun (698a et seq.) testified under oath that 7602 process had been served. In fact, all bank witnesses disclaimed any knowledge of 7602 process being received. John G. Micenko of First Federal (195a-196a, 198a); Robert J. Axon for Swissvale Mellon Bank (213a-214a); Dorothy W. How-

ells for Wilkinsburg Savings and Loan (239a); Thurmond Markland for McKeesport WPNB (245a); Frank X. Burger, Jr., for WPNB-Braddock (261a); Richard E. Lansinger for McKeesport National Bank (268a-269a).

A motion to strike the Micenko testimony (216a-217a) was denied (249a) as was the objection to admission of bank records (132a) as to Micenko (207a-216a), as to Axon (224a), as to Howells (241a), as to Markland (250a), as to Burger and (262a) as to Lansinger.

The Third Circuit Court of Appeals has recognized the duty of privacy owed by a bank to its depositors plus the obligation of the bank to resist the summons until it is enforced by the Court. *U. S. v. Dauphin Deposit Trust Co.*, 3 Cir., 1967, 385 F. 2d 129; *U. S. v. Bank of Commerce*, 3 Cir., 1969, 405 F. 2d 931, 932 (deposits concededly exclusive property of bank; confidential relationship recognized but held to fall before 7602 enforcement proceeding); *Zimmerman v. Wilson*, 3 Cir., 81 F. 2d 847, as modified, 105 F. 2d 583, 586 (case declares broker and bank records privileged; equity restrains broker; second case declares broker records not privileged but does not overrule bank privilege decision).

Since the relationship between the banks and defendant is confidential and since nothing appears of record to indicate that a 7602 process was served, defendant urges that the bank evidence be suppressed.

The trial judge believes (102a) that defendant's May 7, 1968 letter to Carpenter (101a-105a) requested the right to be present when all witnesses were interviewed so that he could explain set-offs against what ap-

peared to be income plus prevent criminal use of 7602 process (95a-96a):

Appellant became aware of *U. S. v. Donaldson*, 1971, 91 S. Ct. 534, after his brief had been set in type. He did not have sufficient time available to correct this question and still make the March 11, 1971 court ordered filing deadline.

Nemetz respectfully suggests that *Donaldson* merely holds that a "balancing" of "opposing equities" resulted in a decision that FRCP 24(a)(2) does not "always" mandate taxpayer intervention at the district court level when the IRS requests 26 USC 7402(b) and 7604(a) enforcement of a 7602 summons served on his former employer when (1) no privilege or confidential relationship existed (Nemetz claims his relationship with the banks to be such; see question No. 3) and (2) taxpayer had not yet been indicted for criminal violations which could be supported by the requested evidence. *Donaldson* did not decide (1) taxpayer could not be present at an IRS hearing when a third party was interrogated (see opinion of Justice Douglas, p. 546, F.N. 2) (2) the import if Nemetz question No. 6 and its issues were raised (3) that Justice and Bank of Commerce were overruled beyond the absolute right they gave all taxpayers to intervene, "simply because it is his tax liability which is the subject of the summons," (4) that taxpayers cannot object to the evidence at trial (p. 542) and (5) the import of a request to be present when knowledgeable third parties are interviewed.

In fact, *Donaldson* recognizes the right to intervene when the relationship between taxpayer and summoned

party is claimed to be confidential or priviledged (pp. 538, 542) as Nemetz asserts it to be in his question No. 3.

However, the panel of the Third Circuit Court of Appeals did not adjudicate this issue. (See opinion, p. 89).

After discussing the right to intervene and in relying upon *Donaldson v. U. S.*, 1971, 400 U.S. 517, the panel neglected to observe the argument of Questions Nos. 3 and 5 which urged an absolute right to intervene when a confidential relationship existed between the party being examined, in this case defendant's banks, and the taxpayer.

Defendant respectfully suggests that the panel's reliance on *U. S. v. Newman*, 5 Cir., 1971, 441 F. 2d 165, is misplaced as taxpayer there expressly disclaimed privilege (441 F. 2d at 170) and did not rely upon it in his grounds requesting intervention (441 F. 2d at 168). In fact, *Newman* expressly held that privilege could be raised at trial (441 F. 2d at 174) and this is exactly what Nemetz did without success at his own trial.

That *U. S. v. Donaldson*, 1971, 91 S. Ct. 534, 400 U.S. 517, on which the panel relies, in overruling defendant's request to intervene specifically allows intervention when a confidential relationship is involved (91 S. Ct. at 534 and 542, 400 U.S. at 523 and 530).

Since the greatest source of income tax evasion and civil assessment information is obtained from taxpayers' banks, it is respectfully suggested that the Internal Revenue Service and practitioners in this jurisdiction should be advised whether or not a bank can be examined with-

out previous service of 26 U.S.C. 7602 process and the right of the taxpayer to be notified and/or intervene.

It is respectfully suggested that these two issues are of exceptional importance in adjudicating the right of taxpayers and the Internal Revenue Service so that the decision of this court should be published for guidance of everyone concerned.

Justice v. U. S., 6 Cir., 1966, 365 F. 2d 312, 314, affirmed, 390 U.S. 199, 88 S. Ct. 901 (taxpayer permitted to interevene when 7602 served on his bank which might not adequately protect him and thus foreclose his appeal from adverse judgment).

Since the government invoked the procedure of 26 USC 7602-7605, it is required to follow the mandatory provisions of the Code itself. 26 USC 7602(2) and (3) require that the testimony be taken "under oath" and process served as clearly required by 26 USC 7603 no less than 10 days previous to the examination which must be conducted in a prescribed manner (§7605).

An informal type of investigation, as probably took place in this case, subjects defendant to obvious abuses.

A witness under oath will not be as prone to lie or stretch a point because of hostility or other personal reasons as when no punishment was involved. *Bridges v. Wixon*, 1944, 326 U.S. 135, 153, clearly directs that when regulations require testimony be taken under oath it must be taken under oath or lost.

When the government invokes a certain procedure, it must follow through even though other methods were available before that time. *Service v. Dulles*, 354 U.S.

363, 388 (Secretary can fire summarily; passes regulation to insure due process, must follow it); *Yellin v. U. S.*, 374 U.S. 109, 114 (House Un-American Committee does not comply with its own rules; conviction for contempt reversed especially when defendant had no way of knowing until trial that the conditions had not been followed); *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (petitioner can be discharged without cause, attempt to discharge him for cause disallowed, when insufficient evidence to prove it).

If the government lacks authority in the Revenue Code, no regulation or procedure can expand its power. *Colonnade Catering Corp. v. U. S.*, 1970, 90 S. Ct. 774, 777, 397 U.S. 72, 77.

At the enforcement proceeding, the government has the burden of proving that the investigation is properly authorized and the evidence will be properly used. *U. S. v. Howard*, 1965, 375 F. 2d 673, 679; *U. S. v. Powell*, 1964, 85 S. Ct. 248, 255, 379 U.S. 48, 58.

However, since there is a presumption of regularity in what the Revenue agent does, *Wilson v. Schnettler*, 1960, 365 U.S. 381, 383 (court will not assume arrest without probable cause if no allegations to the contrary); *Dombrowski v. Pfister*, 1964, 380 U.S. 479, 484, 85 S. Ct. 1116, 1119-1120 (it is assumed that the state courts and prosecutors will obey the Federal Constitution) how will the taxpayer protect against improper collection or use of evidence if he is not present at the scene to observe what is happening. *Reisman v. Caplin*, 375 U.S. 440, 445, 84 S. Ct. 508, 511.

Unless this Honorable Court grants the right to notice, especially upon request, *Reisman* and *Donaldson*

have given a right without a remedy. *Smith v. Texas*, 311 U.S. at 130, 61 S. Ct. at 165.

"Rights declared in words might be lost in reality", *Miranda v. Arizona*, 1966, 86 S. Ct. 1602, 1612, 384 U.S. 436, 443; *U. S. v. Brown*, 85 S. Ct. 1707, 1722, 381 U.S. 437, 462 (courts must enforce rights and privileges or they are worthless).

Defendant mentioned at trial (106a) that Carpenter had no authority unless the Revenue Code specifically awarded it to him.

He respectfully suggests that Carpenter was using 7602 process to prepare for this very trial and that the Court should reject his statement to the contrary.

Reisman condemns collection of criminal evidence by civil 7602 process (84 S. Ct. at 513, 375 U.S. at 449).

However, the investigation will not be stopped unless the Special Agent admits he is using it "solely" for criminal purposes, *U. S. v. Erdner*, 3 Cir., 1970, 422 F. 2d 835, 836.

So, he never admits it and, by this device, is allowed to continue assembling evidence which is offered in a criminal 7201 prosecution.

What Carpenter means when he says the investigation is both civil and criminal clearly appears from his trial testimony. He means no criminal case can succeed without added civil assessment so that civil responsibility must be accumulated in order to make out a criminal case. He declares, ". . . but it can never turn out to be strictly criminal." "That is because there has to be additional

civil liability in order to be a case." "Well, we investigate possible criminal investigations at the same time determining whether or not returns are true and correct." (80a) "Investigations could turn out to be a civil matter or it could turn out to be both civil and criminal *but it can never turn out to be strictly criminal.*" (529a)

It is apparent that right from the beginning he had determined to prosecute defendant for 7201 violation. He disclosed this clearly to Father Berg as that witness testified, without contradiction, at the trial:

> "He told me about this Mr. Nemetz's defection in his payment of income tax and there would be a trial later on."
>
> "I believe he said that, yes, there would be a trial later on." (62a)
>
> "He merely told me that Mr. Nemetz had been —would be up for trial." (69a)

When Carpenter examined the microfilm at First Federal during the months of May, June and July, 1968 (515a), he discovered 50 witnesses whose names did not appear in defendant's books. After examining the microfilm "which showed that Mr. Nemetz was cashing checks and putting the money in his pocket . . ." rather than in the books (515a), Carpenter knew that he was on the right track.

> "Q. Well, then, after you looked at all the deposits at First Federal and then saw all the cash that he was not disclosing on the microfilm, you were pretty well convinced at that time that you had a pretty good criminal case, isn't that so?
>
> A. That's correct." (515a)

This certainly would contradict his statement that it was not until October, 1968 that he knew the case was criminal (see also 510a-515a).

Defendant moves (98a) to dismiss the prosecution not founded on proper procedure, and urges a hearing to develop the facts which might justify this relief. Defendant respectfully suggests to the Court of Appeals that it should no longer honor the self serving statement of the special agents that the investigation is not solely criminal especially when we take into account the sole criminal function of the special agent. The Court is asked to take judicial knowledge that after the conviction it will be the Revenue Agent who goes after the assessment and that the Special Agent will drop out of the picture. (See news release of October 3, 1968, 1079a).

Even though the Special Agent will not be ordered to stop the investigation at the enforcement proceeding, the evidence still is subject to objection when offered at trial. It thus appears from the reported cases that defendant has two shots, the first to stop the collection of the evidence and the second to bar its use at the trial itself.

U. S. v. Erdner, 3 Cir., 1970, 422 F. 2d 835, 836 (although 7602 summons will not be enforced when used "solely" for criminal purposes, request to foreclose use at criminal trial held premature); *U. S. v. Mothe*, E.D. La., 1969, 303 Fed. Supp. 1366, 1370 (although 7602 process immune from attack at investigation stage due to joint civil and criminal use, evidence can be challenged at trial); *U. S. v. Grant*, 2 Cir., 1961, 291 F. 2d 327, 328 (taxpayer turns over records without government 7602

reliance, search and coercion can be more completely raised at trial); *U. S. v. Bitz*, 1960, 384 U.S. 251, 255 (improper use of evidence necessary to defend civil jeopardy assessment in tax court can be raised at trial if introduced); *Chakejain v. Trout*, E.D. Pa., 1969, 295 Fed. Supp. 97, 101 (bank not enjoined); (failure to give *Miranda* warnings can be raised at trial); *Hinchcliff v. Clarke*, 6 Cir., 1967, 377 F. 2d 697, 701 (government declared evidence not to be used for criminal prosecution; court enforces summons but bars future criminal use).

In fact, in following *Cole*, supra, *Stone v. Williams*, 1 Cir., 1966, 356 F. 2d 934, 935, reserved to taxpayer his right to object to the evidence when and if it was offered at trial.

Carpenter knew he was on the right track at the beginning and never found anything after examining the First Federal records which changed his mind (534a). It is respectfully suggested that the Court should find as a fact that he was on the criminal trail from the beginning and that the 7602 summons evidence accumulated cannot be used in this trial.

After the Supreme Court observed in *Wolf v. Colorado*, 338 U.S. 25, that state agents were violating the Federal Constitution, it became necessary to stop it by *Mapp v. Ohio*, 367 U.S. 643, and its progeny.

It is apparent that the special agents will go as far as they are allowed in collecting criminal evidence with civil process. The Court is respectfully urged to recognize the problem once and for all and bar use of 7602 collected evidence in a criminal trial.

Hatahley v. U. S., 351 U.S. 173, rules that if correct procedure is not followed together with required notices the entire matter is a nullity. *Abel v. U. S.*, 362 U.S. 217, 226; 230, condemns collecting criminal evidence in a civil process. *Elkins v. U. S.*, 364 U.S. 206, 223, observes that government agents must "obey the law scrupulously" and *Singer v. U. S.*, 85 S. Ct. 783, 791, 380 U.S. 24, 37, states that the United States attorney is a servant of the law. See cases collected in *U. S. v. Kordell*, 397 U.S. at 12.[16]

As can be seen from a discussion in the next question, defendant claims that what appears to be income was in fact offset by corresponding expenses. Every witness, as shown by Exhibit A, defendant's brief, testified that labor, material and supplies came out of the gross amount paid to defendant. Carpenter knew this but did not present any evidence concerning it, leaving this job to defendant.

The government was put on immediate notice (23a, 661a) that defendant relied on *Sansome v. U. S.*, 35 S. Ct. 1001, 1010, 380 U.S. 343, 352, and further took the position that under *Holland v. U. S.*, 1954, 348 U.S. 121, government was under some duty to investigate the amount of material and supplies used in the work so that the gross amount would not be credited as income by the jury.[16]

Additionally, since the records were lost and no evidence was presented that this was not so defendant was helpless. In order to put in any defense, he would have been required to waive his 5th Amendment right not to take the stand.

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[16] The factual details of this argument are presented in the next question.

If he had been permitted to intervene in the proceeding before the Special Agents, he would have been able to cross-examine the witnesses and disclose as a matter of record to the government that everything was not income. Additionally, in regard to the bank accounts, he would have been able to show that the almost $500,000 deposited was a churning of the same money over and over.

The government would then have been under an obligation to present this to the jury, *Brady v. Md.*, 1963, 373 U.S. 83, and the entire prosecution might not have taken place and the conviction might not have followed.

If evidence has been improperly accumulated under Exhibit B-7602 process, it should be suppressed even though the government might have collected it if it had given the notice to intervene and proceeded properly as required by the Code. *Mancusi v. DeForte*, 88 S. Ct. 2120, 2125; footnote 12, 392 U.S. 364, 372; *Silverthorne Lumber Co. et al. v. U. S.*, 1920; 251 U.S. 385, 392.

It is respectfully submitted that the evidence should be suppressed and a new trial awarded.

Defendant preserved their issues in new trial motion paragraphs 1, 2, 10, 39. It was not covered in the lower court opinion.

The adjudicating panel of the Third Circuit did not meet this issue head-on (p. 87). Petitioner respectfully suggests that the Third Circuit overlooked the fact that *U. S. v. Donaldson* allows intervention when a confidential relationship is involved (91 S. Ct. at 538, 542, 400 U.S. at 523, 530). (See Petition for Reargument, p. 90.)

Petitioner respectfully suggests that the impact of Internal Revenue Service investigations touches the life

of every employed and income-receiving resident of the United States and that this Honorable Court should set guidelines plus instruct those concerned exactly what can and cannot be done in these increasing-in-number-and-intensity investigations.

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4. In a 26 U.S.C. 7201 specific item prosecution, must Government aid Defendant in proving deduction allowable under U. S. v. Sansone, 1965, 85 S. Ct. 1004, 1010; 380 U.S. 343, 352, when his records have been stolen previous to IRS contact and investigation and does deliberate failure to do this qualify as a suppression of evidence within the meaning of Brady v. Md., 1963, 373 U.S. 83 and its progeny?

Petitioner's desire to participate in the 26 U.S.C. 7602 interview was not founded on idle curiosity but on a specific desire to explain away what would at first appear to be evidence of tax-reporting dereliction.

The issues raised here were preserved at trial and in new trial motion paragraphs 9, 27, 30, 35, 36, 37, 46, 47, 50, 53, 56 and 65.

A. Defendant's claim (356a-357a; 710a) that his records plus $9,000 worth of copper had been stolen and/or burned stands undenied and uninvestigated by Government (580a, 711a), but corroborated by Defendant's wife (848a), his accountant (338a-339a), his witness, DeLucente (884a) plus police reports (Exhibits O and N, 745a, 750a).

B. Every witness (except a few whom defendant forgot to ask) produced by prosecution admitted (70a-85a) the money paid to defendant included labor and material (see Defendant's Brief Exhibit) which the trial Court recognized as deductible item (1017a, 1015a, 1028a, 1029a).

C. Government was alerted when the trial began (23a) and while Carpenter was on the stand (661a) that defendant relied on *Sansone v. U. S.*, 1965, 85 S. Ct. 1004, 1010, 380 U.S. 343, 352 (undeclared expenses can be set off by undeclared income to avoid 7201 conviction).

D. Since his request to participate when the witnesses were interviewed before trial by Carpenter had been denied, defendant lost the opportunity at that time to disclose through them and by his own evidence that what he had received was gross, not net, income.

If present, he could have shown the extent and value of the labor and material he was required to deliver under his contract plus presented the evidence disclosed at trial. Carpenter would then have been required to include these explanations in his report.

His superiors, when confronted with this entire picture, might not have approved the recommendation for prosecution.

(1) Defendant's participation at the First Federal and other banks would have disclosed that the many deposits totaling $48,477.12. (639a, 648a, 277a, 279a, 289a) were only a churning of the same money (160a-186a, 161a, 162a, 163a, 171a, 178a, 191a-192a, 228a, 256a-259a, 275a) plus that he had not deducted interest

expense which would cancel much of the undeclared interest income (26a, 39a, 41a).

The use of the funds from the joint loans made to defendant and Joseph Yesko (186a-188a, accounts Nos. 3595, 3600, 3611) and the defendant-guaranteed loans to McCauley (188a-191a, accounts Nos. 3617, 3825, 3867) could have been explained as could the source of funds for repayment.

(2) Viott's trial testimony that defendant did not claim his allowable cash deductions (310a, 313a-318a) plus his non-deducted joint enterprises with others expense (310a) could have been developed.

(3) Carpenter's prejudicial technique of directing the bank witnesses bring in only what helped government (213a, 216a, 127a, 271a-272a), but withhold what advantaged defendant (157a-158a, 149a, 146a, 171a, 169a, 172a, 211a, 216a, 228a-229a, 253a, 271a) could have been exposed (government in trial objection to defense attempt to correct this; 149a-150a, 228a, was sustained, 151a, 158a, 235a, 661a, 662a, 664a-665a, 42a-43a).

(4) Carpenter's failure to offset allowable expense (P & LE, 681a, 929a; Braddock, 85a, 594a, 608a; St. Brendan's, 67a, 69a, 625a-626a; 50 customer witnesses, 619a, 630a) could have been corrected.

(5) His omission to check out the $80,000 grandfather story (592a-593a, 596a-597a) could have been exposed.

(6) In addition, Carpenter made no attempt to interrogate defendant (614a, 633a-634a) who did not refuse cooperation (599a-600a, 633a-634a). Although de-

fendant might have refused to talk himself, he could have cross-examined witnesses and produced evidence through witnesses of his own.

(7) Also, Carpenter did not ask endorsees of various checks on which defendant was payee whether the money was a business deduction. (See, for example, 688a, 689a.)

(8) Carpenter's half-hearted attempt to discover and credit payments made to suppliers (668a-669a) was exposed when these witnesses were produced at trial by defendant to contradict what they allegedly told the special agent (contrast 668a-670a with 765a, 756a). The suppliers, who appeared as defense witnesses, supported his claim that all materials were purchased by cash but all except one (945a) could give no definite figure due to lack of records (756a, 765a, 939a).

E. Defendant respectfully suggests that it was unfair for Carpenter to add undeclared income to gross without giving deductions discovered by him similar treatment for the years 1964, 1966, and 1967 (650a, 651a, 656a, 675a-676a, 682a, 685a, 693a) by adding them to deductions claimed.

F. Defendant's detailed and factually supported attempt to prove by his admitted expert (807a, 822a) loss on Braddock (828a, 857a, 860a, 871a, 883a) and small profit on St. Brendan's (883a) should have been credited as a complete defense (779a, 780a, 806a, 895a) in light of Carpenter's admission that competition kept the Braddock profit low (678a).

Instead, the Court (1030a-1031a) both undermined the evidence by classifying it as a mere opinion despite

objection (1042a) and blocked defendant in his attempt to support these deductions by national trade averages which figures could have been supplied by subpoenaed local IRS Director Long (900a-925a).

G. Introduction of the bank records which disclosed $481,477.12 deposits was an unnecessary prejudice. If they were used to show only undeclared interest as government claims (286a) the material could have been presented in a form limited to this alone.

However, the Court prevented defense attempt to show it was not income (178a, 181a, 193a, 277a-279a, 289a) permitted the government to use it for evidence of regular and periodic deposits to corroborate the specific items (286a-289a), allowed the prosecutor to argue this in his closing address (994a-996a) and backed him up in the charge (1027a).

Defendant argues the short instruction (1017a) to consider the deposits on the interest issue alone and the assurance given in open court that error would be corrected by the award of a new trial (643a, 644a-645a, 647a, 649a) did not erase what was otherwise said on the subject. *U. S. v. Blumberg*, 5 Cir., 1955, 222 F. 2d 1496, 1499 ($30,000 wedding held prejudicial even though income declared); *Singer v. U. S.*, 3 Cir., 1932, 58 F. 2d 74, 75 (partnership income heard by jury stricken; held uncorrectable by charge); *U. S. v. Caserta*, 3 Cir., 1952, 199 F. 2d 905, 908 (partnership income not attributed to defendant introduced and stricken; conviction reversed).

Carpenter did not hesitate to admit his duty to present evidence helpful to defendant (584a, 588a-589a,

631a-632a, 624a). However, the Court is urged to find this duty unfulfilled during the investigation stage, at the empty ceremony explanation opportunity (623a, 603a, 606a-609a, see Exhibit L, 1080a) and at the trial itself. *Mooney v. Hollahan*, 294 U.S. 103; *Pauli v. Kansas*, 272 U.S. 213; *Napue v. Ill.*, 360 U.S. 264; *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785; *U. S. v. Rutkin*, 3 Cir., 1954, 212 F. 2d 641; *U. S. ex rel. Almeida v. Baldi*, 3 Cir. 1952, 195 F. 2d 815; *New Canons of Professional Ethics*, D.R. 7-103(b); 7-109(a) (b), 7 E.C. 7-13.

Wherefore, petitioner respectfully suggests:

(1) That the United States Supreme Court grant a writ of certiorari in this case; and

(2) That it reverse the judgment of the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ALLEN N. BRUNWASSER

Attorney for Petitioner

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 69-55

United States of America

vs.

Joseph A. M.

OPINION AND ORDER

Marsh, District Judge.

The defendant, Joseph A. Nemetz, was convicted of five counts of wilfully attempting to evade or defeat his income tax for the years 1962, 1963, 1964, 1966 and 1967. Title 26 U.S.C., §7201. The evidence of his guilt was overwhelming. He has moved for a new trial assigning 66 reasons. The motion will be denied.

The great majority of the reasons assigned were the subject of motions and objections made by the defendant at trial. Most of them were argued at length by defendant's counsel, duly considered, and adverse rulings made.

These reasons have been reconsidered and it is the opinion of the court that none of them would merit a new trial. Excessive delay would ensue were all of the 66 reasons to be reconsidered after the record has been transcribed only to reaffirm the rulings which the court now believes were correct. This is not to say that some error did not creep into the trial, but that which did, we think was harmless especially in view of the ample and largely undisputed evidence of guilt. Rule 52, Fed. R. Crim. P. Indeed, it appeared to the court at trial that defendant based his defense on a lively expectation, with some instigation from astute counsel, that the court would say something or make a ruling that would produce a mistrial or ultimately a new trial.[1]

The defendant requested and was granted a "Jackson v. Denno" hearing in the absence of the jury to test the voluntariness of his disclosures to special agents of the Internal Revenue Service at an interview at his office on May 6, 1968. The defendant's counsel interrogated the special agents at length. Their testimony showed that the defendant's disclosures were voluntary and certain of his records were freely turned over to them. The defendant did not take the witness stand to repudiate one word of the agents' testimony or to testify to any involuntariness, coercion, inducement, trickery, guile or misrepresentation.[2] Accordingly, the court refused to suppress the testimony of the special agents.

[1] In the first trial, the defendant succeeded in securing a mistrial when the court made statements in the presence of the jury which the defendant claimed, and the court believed, were irreparably prejudicial.

[2] The defendant's lengthy cross-examination of Special Agent Carpenter at the "Jackson v. Denno" hearing was replete with

Upon resuming the trial before the jury, no evidence whatsoever was adduced that what defendant disclosed to the special agents at the interview on May 6th was a confession or that anything he said or did was involuntary. Special Agent Carpenter testified that defendant told them that his grandfather had given him approximately $80,000 in 1949 which he had kept in a brown paper bag until 1963 when he began to deposit the money in trust accounts for his four children. Examination of the deposits in four of the trust accounts (Exs. 147, 149, 151, 153) reveals that they were equal and in driblets from November, 1961, to May, 1968, when they were closed out. The prosecution was within bounds to argue that this bizarre recital was incredible. Reason No. 41 is without merit. Both agents testified before the jury that after defendant was given what was substantially a Miranda warning [3] he freely turned over some records and his 1967 tax return; he did not admit to them that

collateral issues which did not in any way impugn the voluntariness of the interview.

[3] The following cases hold that a Miranda warning does not extend to a pre-custody Internal Revenue Service inquiry: United States v. Jerrigan, 411 F. 2d 471 (5th Cir. 1969); Cohen v. United States, 405 F. 2d 34 (8th Cir. 196-); United States v. Squari, 398 F. 2d 785 (2d Cir. 1968); Spinney v. United States, 385 F. 2d 908 (1st Cir. 1967); United States v. Maius, 378 F. 2d 716 (6th Cir. 1967); Morgan v. United States, 377 F. 2d 597 (1st Cir. 1967); Rickey v. United States, 360 F. 2d (9th Cir. 1966); Kohatsu v. United States, 351 F. 2d 898 (9th Cir. 1965); United States v. Charamella, 294 F. Supp. 280 (D. Del. 1968); United States v. White, 293 F. Supp. 682 (E.D. Pa. 1968); United States v. Basil, 268 F. Supp. 1018 (S.D. Fla. 1967); United States v. Bachman, 267 F. Supp. 593 (W.D. Pa. 1966); United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966).

he had understated his taxes or had underreported his income for any taxable year. Notwithstanding, the defendant contends that "the confession was not voluntary" and it was error to refuse to suppress it. (Reason No. 2) The jury was told to disregard the defendant's disclosures if they were found to be involuntary.[1]

Following the interview, investigation by the agents revealed a pattern of substantial underreporting of income for all the indictment years. It was also shown that following the request on May 2, 1968 by the agents for an interview, the defendant withdrew nearly $100,000 from his several savings accounts on May 3rd and 7th, 1968.

Constantly throughout the trial the defendant contended that the court should have required "the government [to] supply a complete examination and furnish explanations of materials and supplies plus labor and the reasonable costs thereof, all of which placed the burden of doing this on defendant." (Reason No. 9.) In the first place, the prosecution, after inquiry by defendant, stated explicitly in writing that its method of proof of tax evasion was the "specific items" method.[2] If the "burden" was cast upon the defendant to prove the cost of his materials, supplies and labor, he failed to adequately meet it. Although there was evidence that several persons helped the defendant in his roofing and construction business, not one of them was called to establish his method

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[1] Cf. Williams v. United States, 189 F. 2d 693 (D.C. Cir. 1951), wherein it was held, absent evidence of involuntariness, that it was unnecessary to submit that question to the jury.

[2] See brief of the United States in response to motions filed by the defendant, page 4, item E, and Judge Gourley's Order filed on July 9, 1969, at p. 4.

or rate of compensating them. His tax returns indicated that he subcontracted his contracts, but not one subcontractor was called in defense to substantiate a sharing of the proceeds in excess of that stated in the returns as the cost of subcontracting. Since he paid for his supplies in cash only the defendant and his workman had the personal knowledge to estimate the materials and supplies which went into each job—but none of his workmen was called. The defendant's cash invoices were allegedly stolen or destroyed by fire.

It was held in United States v. Stayback, 212 F. 2d 313 (3d Cir. 1954), and in United States v. Shavin, 320 F. 2d 308 (7th Cir. 1963), that in a specific items case, the government does not have the burden of establishing the defendant's operating costs. In Stayback it was stated (p. 317):

> "It is well settled that once the government establishes unreported income of the defendant and allows deductions claimed by him in his tax return and others that it can calculate without his assistance, the burden is on the defendant to prove that he had other allowable deductions which were not shown in his return: United States v. Smith, 3 Cir., 1953, 206 F. 2d 905; United States v. Link, 3 Cir., 1953, 202 F. 2d 592; United States v. Hornstein, 7 Cir., 1949, 176 F. 2d 217. The government is not required to prove the negative, i.e. that the defendant did *not* have any other deductions. Gariopy v. United States, 6 Cir., 1951, 189 F. 2d 459.
>
> * * *
>
> "The figures of cost of goods sold, as they were used in preparing his tax returns, were at least

admissions by the defendant which the government could utilize in making a prima facie case. The defendant was chargeable with them until he offered credible evidence to show that the figures were in error, and that his costs were greater. * * * The defendant herein was under an obligation to keep correct books and records; he did not do so. Having adopted that course he cannot now sit back and insist that the government prove a complete debit and credit account.'"

Of course, the burden of proof rested on the prosecution, and the jury was so instructed. But the prosecution does not have the burden of going forward with the evidence to negate unreported deductions. United States v. Precario, 356 F. 2d 614 (2d Cir. 1966).

No requirement exists to compel the Internal Revenue Service to investigate the defendant's case, although in a net worth case, agents are required to follow up reasonable explanations by the taxpayer inconsistent with guilt. Holland v. United States, 348 U.S. 121 (1954). This rule does not apply in a specific items case, especially where, as here, no explanations were advanced by the taxpayer to the Internal Revenue Service relating to unreported expenses for materials, supplies, labor and unreported payments to subcontractors. Not until the trial did the defendant contend, largely by way of cross-examination, that he had understated the costs of materials, supplies and labor.[6] He never advised the Internal Revenue Service of his alleged unreported expenses and dis-

[6] It is to be noted that defendant was given credit for "additional" expenses in each indictment year (Ex. 167).

bursements. Cf. United States v. Precario, supra. The only testimony he introduced on this point was in attempting to establish certain business expenses, "No one would doubt that the jury was not bound to believe the underlying facts upon which he says those deductions are based." United States v. Smith, 206 F. 2d 905, 910 (3d Cir. 1953).

Not only did the government explicitly state that it would rely on the specific items method to prove the defendant's guilt, but summaries (Ex. 16) contained only the amounts the defendant was paid by the persons who hired him plus items of interest he received during the indictment years. No one suggested that the deposits in the trust accounts in the First Federal Savings & Loan Association of Homestead were to be computed as unreported income. The trust accounts and his other savings and loan accounts were introduced solely to show the specific items of interest he received during the indictment years.

Another matter which the defendant raised throughout the trial and in his motion was that certain checks, introduced as exhibits to corroborate the testimony of government witnesses that they had paid the defendant various amounts of money for work he had done, were inadmissible absent proof that the endorsements on the checks, purporting to be the defendant's signatures, were actually signed by the defendant. Each witness testified that the defendant had been paid for work contracted and performed, and each signed the check as payor or identified the signature of the payor. Apparently, the defendant would have the government negate a forgery of the check endorsements in his name. The issue, with respect to the checks, was not whether the defendant en-

dorsed the checks, but, rather, whether the defendant received certain payments for work done to which the payors testified and affirmatively produced their cancelled checks as corroborative evidence of payment. In the circumstances there was no error in admitting the checks into evidence. Moreover, if proof were needed that the defendant's endorsements on the checks were authentic, it could be found in abundance. Many of the 58 witnesses testified that they not only paid the defendant by check but that he signed contracts for the work and receipts when he was paid. Many such contracts and receipts were admitted into evidence along with the cancelled checks, and the defendant does not complain of their admissibility into evidence. These documents and the savings and loan signature cards and ledger sheets introduced into evidence bear undisputed signatures of the defendant, and the most cursory examination of them will reveal their unmistakable similarity to the endorsements on the checks.

The defendant assigns as error the instructions on reasonable doubt (Reason No. 61). He contends that the court improperly used the standard "of the highest importance" in defining reasonable doubt. In United States v. Ward Baking Company, 224 F. Supp. 66, 76 (E.D. Pa. 1963), it appears that Judge Van Dusen in that case and a number of other cases, in his instructions on reasonable doubt used the words "in matters of highest importance". In United States v. Senior, 274 F. 2d 613, 617 (7th Cir. 1960), the words "to pause or hesitate before acting in a grave transaction of your own life" were used and approved. Similar words have been used by other district courts. United States v. Interstate Engineering Corpora-

tion, 288 F. Supp. 402 (D. N.H. 1967); Scurry v. United States, 347 F. 2d 468 (O.C. Cir. 1965); United States v. Schneiderman, 106 F. Supp. 906 (S.D. Cal. 1952); United States v. Foster, 9 F.R.D. 367 (S.D. N.Y. 1949). There is no merit in reason No. 61.

An appropriate order will be entered.

ORDER OF COURT

And Now, to-wit, this 25th day of February, 1970, after due consideration, It Is Ordered, Adjudged and Decreed that the defendant's Motion for New Trial be and the same hereby is denied.

(signed) Rabe F. Marsh
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 69-55

United States of America

vs.

Joseph A. Nemetz

ORDER OF COURT

And Now, to-wit, this 25th day of February, 1970, upon due consideration of defendant's "Motion for Judgment of Acquittal and Arrest of Judgment", It Is Ordered, Adjudged and Decreed that said motion be and the same hereby is denied.

(signed) Rabe F. Marsh
United States District Judge

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 18,850
United States of America
v.
Joseph A. Nemetz, Appellant

Appeal From the United States District Court
For the Western District of Pennsylvania

Argued October 5, 1971
Before McLaughlin, Ganey and Adams,
Circuit Judges

OPINION OF THE COURT
(Filed November 4, 1971)

Per Curiam:

Joseph Nemetz was convicted of violating 26 U.S.C. §7201 by wilfully evading the payment of taxes for the years 1962, 1963, 1964, 1966 and 1967. Following the denial of his motion for a new trial,[1] Nemetz appealed

[1] Chief Judge Marsh's able opinion denying the motion is reported at 309 F. Supp. 1336 (W.D. Pa. 1970).

setting forth a number of grounds for reversal of his conviction and the award of a new trial.

The evidence of Nemetz's guilt adduced at his jury trial was, according to the district court, overwhelming. Nemetz was a building contractor engaged primarily in home roof repairs. The government, by direct evidence, showed that the taxable income Nemetz should have reported in the years specified in the indictment far exceeded that which he did report.[2]

The two substantial contentions advanced by Nemetz concern his right to counsel during the Internal Revenue Service [IRS] investigation of his records, and his alleged right to intervene during IRS interviews of persons served with process pursuant to 26 U.S.C. §7602.

In March, 1968, the IRS, acting on information received from an informant, assigned a special agent, Vernon Carpenter, to examine Nemetz's financial records. On May 2, 1968, the special agent telephoned Nemetz and told him he was to investigate Nemetz's 1964, 1965 and 1966 tax returns. The special agent further stated that he wished to see Nemetz's cancelled checks, books and

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[2] The following table illustrates the large variances between Nemetz's reported income and the taxable income the government proved should have been reported.

	Taxable Income Per Return	Proven Taxable Income
1962	$3,252.67	$26,860.40
1963	2,906.91	33,377.43
1964	337.35	7,873.47
1966	5,037.94	63,332.91
1967	4,083.98	12,061.03

records, and arranged a meeting on May 6, 1968 for that purpose.

Concerning the May 6th meeting, Carpenter's uncontradicted testimony at the Jackson v. Denno hearing and at trial was:

> A. "Well, I told Mr. Nemetz that as a special agent it was my duty to investigate possible criminal income tax violations. I also informed him that I had been assigned to investigate his income tax liability for the years '64, '65 and '66, and I told him that under the Constitution of the United States he had the right to refuse to answer any questions, furnish any information or submit any documents which he felt might tend to incriminate him. I also told him that any information which he did furnish or any documents which he did submit could be used against him in any criminal action that might be undertaken.
>
> As I was finishing my statement to Mr. Nemetz, he told me he understood he also had the right to have an attorney present during the interview and I told him that was correct, he did have the right to have an attorney present during the interview. I then asked him if he wished to proceed with the interview without an attorney. He said he did, and so I asked him questions relative to his financial and income tax liability.
>
> Q. Did you ask him if he understood his rights?
>
> A. Yes, I did. He said that he did."

Based on this and other testimony presented at the Jackson hearing, the trial judge found that all the actions taken by Nemetz at the May 6th meeting were voluntary

and that all the evidence obtained therefrom was admissible.

Nemetz contends that the right-to-counsel warning given him by Carpenter was inadequate under the test of Miranda v. Arizona, 384 U.S. 436 (1966). This Court has held, however, that the stringent Miranda doctrine does not apply to tax fraud investigations. Rather the traditional voluntariness test is to be utilized: United States v. Jaskiewicz, 433 F. 2d 415 (3rd Cir. 1970). The testimony quoted above illustrates Nemetz's knowledge and understanding of his rights and that any action he took was voluntary. Under these circumstances, since Nemetz was completely aware of his right to counsel, no error was committed in admitting into evidence his books, records and cancelled checks.

Nemetz next claims that because he was not permitted to intervene during interviews conducted by IRS agents with persons whose appearances had been compelled by service of Section 7602 summonses, all evidence obtained as a result of these meetings should have been suppressed. That the taxpayer has no absolute right to intervene in such proceedings is beyond question. Donaldson v. United States, 400 U.S. 517 (1971). Further, in a more compelling case than that presented by Nemetz, the Fifth Circuit held that an order of the district court granting intervention—although based on its sound discretion—was nevertheless improper. United States v. Newman, 441 F. 2d 165 (5th Cir. 1971). We are unable to distinguish Nemetz's case from either Donaldson or Newman and we hold, therefore, under the facts established at trial, that Nemetz had no right to intervene.

The other points raised by Nemetz have been carefully considered, and we find them lacking in merit. Accordingly, the judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING AS PERMITTED BY FEDERAL RULE OF APPELLATE PROCEDURE 40 AND SUGGESTION FOR REHEARING BY COURT EN BANC AS PROVIDED BY FEDERAL RULE OF APPELLATE PROCEDURE 35

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

Joseph A. Nemetz respectfully requests rehearing and rehearing by the Court en banc for any or all of the following reasons:

1. On November 4, 1971, defendant's five count conviction and sentence for willful evasion of income tax prohibited by 26 U.S.C. 7201 was affirmed by Circuit Judges Gerald McLaughlin, J. Cullen Ganey and Arlin M. Adams.

2. That the opinion discusses only:

A. Does *Miranda v. Arizona*, 384 U.S. 436, apply to an interview by an Internal Revenue Special Agent?

B. Does defendant have a right to intervene in a 26 U.S.C. 7602 proceeding?

3. That on page 4 of the opinion, the panel declared that the other issues raised in the brief of defendant were "lacking in merit".

4. That Circuit Judge Francis L. VanDusen on February 8, 1971, after personal examination of the typewritten transcript, permitted defendant to file a 73 page brief rather than the 50 page brief permitted by Federal Rule of Appellate Procedure 28(g). Additionally, on March 31, 1971, Circuit Judge William H. Hastie permitted defendant to file a 74 page brief, instead of the requisite pages permitted by said Rule 28(g).

5. That for this reason, it is respectfully submitted that these Circuit Judges believed that the nine issues raised by defendant were meritorious and deserved consideration by this Honorable Court.

6. Defendant respectfully suggests that the panel which adjudicated his case overlooked or misapprehended the issues involved in the following particulars:

A. After discussing the right to intervene and in relying upon *Donaldson v. U. S.*, 1971, 400 U.S. 517, the panel neglected to observe the argument of Questions Nos. 3 and 5 which urged an absolute right to intervene when a confidential relationship existed between the party being examined, in this case defendant's banks, and the taxpayer.

B. Defendant respectfully suggests that the panel's reliance on *U. S. v. Newman*, 3 Cir., 1971, 441 F. 2d 165, is misplaced as taxpayer there expressly disclaimed privilege (441 F. 2d at 170) and did not rely upon it in his grounds requesting intervention (441 F. 2d at 168). In fact, *Newman* expressly held that privilege could be raised at trial (441 F. 2d at 174) and this is exactly what Nemetz did without success at his own trial.

C. The panel neglected to observe that defendant was not relying upon *Miranda* but upon *U. S. v. Hefner*, 4 Cir., 1969, 420 F 2d 809, which case was specifically acknowledged in *U. S. v. Jaskiewicz*, 1970, 433 F. 2d 415, but not applied by footnote 10 because it post-dated the factual situation involved before Circuit Judges Ruggero J. Aldisert, John J. Gibbons and Winter, specially sitting, which Circuit Judge had participated in the adjudication in *Hefner*.

D. That the opinion of the panel overlooked the fact that it was not the May 6, 1968 interview which defendant challenged but the phone interview and direction which took place on May 2, 1968 and the failure of the special agent to comply with the Internal Revenue Service directions on that date. This issue is taken up in the first question beginning on page 8 of defendant's brief.

E. The panel neglected to observe that defendant was not relying upon *Miranda* but arguing that the first interview is a "critical stage" of the proceeding as interpreted by *Coleman v. Alabanta*, 1970, 90 S. Ct. 1999, 2002, 399 U.S. 1, 7; *U. S. v. Wade*, 1967, 87 S. Ct. 1926, 1930-1931, 388 U.S. 218; 222-223, and *U. S. v. Silverstein*, 3 Cir., 1963, 314 F. 2d 789, 790.

7. That the issue of defendant's right to intervene is discussed in Questions Nos. 3 and 5 of his brief filed in this Court. These questions specifically raise the following issues:

A. "Does a confidential relationship exist between a bank and its depositor, and if it does, must

26 U.S.C. 7602 process be served before the bank records are made available for I.R.S. special agent examination?" (Question No. 3.)

B. "If 7602 process is served and if the Exhibit B letter is authorized, does the taxpayer have an absolute right, upon previous request, to notice that the summons has been served and/or the letter mailed plus the opportunity to intervene and participate when the special agent interviews the witness so that he can prevent improper use of the summons or letter and the disclosure of helpful evidence which would prevent his prosecution?" (Question No. 5.)

8. That the records in this case shows that without examination of the banks, the other evidence would not have been available to the government and, therefore, these issues are vital to defendant's resistance to his prosecution, conviction and sentencing.

9. That *U. S. v. Donaldson*, 1971, 91 S. Ct. 534, 400 U.S. 517, on which the panel relies, in overruling defendant's request to intervene specifically allows intervention when a confidential relationship is involved (91 S. Ct. at 534 and 542, 400 U.S. at 523 and 530).

10. That defendant respectfully suggests that the entire matter should be heard by the Court en banc because:

A. *Jaskiewicz*, supra, in footnote 10, recognizes the existence of *Hefner* but the panel does not. It is respectfully suggested that uniformity of decisions in this Circuit requires that practitioners in this jurisdiction and the Internal Revenue Service be advised whether or not directives of a government agency can be flaunted with impunity.

B. Since the greatest source of income tax evasion and civil assessment information is obtained from taxpayers' banks, it is respectfully suggested that the Internal Revenue Service and practitioners in this jurisdiction should be advised whether or not a bank can be examined without previous service of 26 U.S.C. 7602 process and the right of the taxpayer to be notified and or intervene.

C. It is respectfully suggested that these two issues are of exceptional importance in adjudicating the right of taxpayers and the Internal Revenue Service so that the decision of this Circuit, joined in by the entire Court, should be published for guidance of everyone concerned.

11. That it is respectfully suggested that if Circuit Judges Francis L. VanDusen and William H. Hastie believed that the issues raised in this appeal were sufficiently important to permit the filing of a 74 page brief, the entire Court en banc of this Circuit should decide, as a matter of uniformity, whether the panel was correct in adjudicating that the issues were without merit or whether the Circuit Judges who permitted the extended brief be filed were correct.

12. That the issues raised in the appeal and allowed to be printed in the 74 page brief by Circuit Judges Francis L. VanDusen and William H. Hastie are:

1. Is a new trial mandated when a special agent of the Internal Revenue Service deliberately violates a procedural directive of his agency by not clearly disclosing his criminal function at the initial contact with the to be

investigated taxpayer within the meaning of *U. S. v. Hefner*, 4 Cir., 1969, 420 F. 2d 809, and cases cited therein?

2. When special agents of the Internal Revenue Service confront a taxpayer for the purpose of obtaining oral admissions plus his written records for use in the investigation they are then conducting into his affairs, is this a "critical stage" which mandates a right to counsel warning within the meaning of *Coleman v. Ala.*, 1970, 90 S. Ct. 1999, 2002, 399 U.S. 1, 7; *U. S. v. Wade*, 1967, 87 S. Ct. 1926, 1930-1931, 388 U.S. 218, 222-223, and *U. S. v. Silverstein*, 3 Cir., 1963, 314 F. 2d 789, 790, and, if so, has defendant waived this right under the fact circumstances of this case when examined in light of *Johnson v. U. S.*, 330 U.S. 10, 12; *Amos v. U. S.*, 1920, 225 U.S. 313, 315, 317; *Fraternal Order of Eagles v. U. S.*, 3 Cir., 57 F. 2d 93, and *Von Moltke v. Gillies*, 1948, 332 U.S. 708, 724?

3. Does a confidential relationship exist between a bank and its depositor and, if it does, must 26 U.S.C. 7602 process be served before the bank records are made available for I.R.S. special agent examination?

4. Is the Exhibit B letter authorized by the Internal Revenue Code and, if not, should the evidence accumulated by its use be suppressed?

5. If 7602 process is served and if the Exhibit B letter is authorized, does the taxpayer have an absolute right, upon previous request, to notice that the summons has been served and or the letter mailed plus the opportunity to intervene and participate when the special agent interviews the witness so that he can prevent improper

use of the summons or letter and the disclosure of helpful evidence which would prevent his prosecution?

6. In a 26 U.S.C. 7201 specific item prosecution, must government aid defendant in proving deductions allowable under *U. S. v. Sansone*, 1965, 85 S. Ct. 1004, 1010, 380 U.S. 343, 352, when his records have been stolen previous to I.R.S. contact and investigation and does deliberate failure to do this qualify as a suppression of evidence within the meaning of *Brady v. Md.*, 1963, 373 U.S. 83 and its progeny?

7. Was it proper to receive records produced by Father Bernard J. Berg, John G. Micenko and Robert J. Axon, which records were not properly qualified as required by 28 U.S.C. 1732(a) and because no testimony was produced that the entries in them were made "at the time of such act, transaction, appearance, or event or within a reasonable time thereafter" and because Father Berg refreshed his recollection from an unqualified memo?

8. May the jury consider an uncorroborated exculpatory statement made to an I.R.S. special agent?

9. Is it proper for a trial judge in sustaining an objection, to testify as a witness as to what the answer, if allowed, would be?

Wherefore, petitioner requests:

A. That reargument be allowed;

B. That reargument be allowed before the Court en banc as permitted by Federal Rule of Appellate Procedure 35.

Respectfully submitted,
ALLEN N. BRUNWASSER,
Attorney for Appellant.

UNITED STATES COURT OF APPEALS
For the Third Circuit
No. 18,850

United States of America

v.

Joseph A. Nemetz

SUR PETITION FOR REHEARING

Present: Chief Judge Seitz, Judge McLaughlin, Judge Ganey, Judge Van Dusen, Judge Aldisert, Judge Adams, Judge Gibbons, Judge Rosenn, Judge Rosen, Judge Hunter.

The petition for rehearing filed by JOSEPH A. NEMETZ in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Arlin M. Adams
Judge

Dated:
December 3, 1971